THE

HISTORY

OF THE

CASES

OF

CONTROVERTED ELECTIONS,

WHICH WERE

Tried and determined during the First and Second Sessions of the Fourteenth Parliament of Great-Britain.

XV AND XVI GEO. III.

BY SYLVESTER DOUGLAS, ESQ. of LINCOLN'S-INN,
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Quod neque inflecti gratiâ, neque perfringi potentia, neque adulterari pecuniâ possit. CIC.

IN FOUR VOLUMES.

VOL. III.

DUBLIN:

PRINTED BY J. WILLIAMS, [No. 21.] SKINNER-ROW.

M,DCC,LXXVIII.

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PREFACE.

WHEN I publiſhed the firſt and ſecond volumes of this book, I had not entirely reſolved, and, therefore, did not undertake, to continue the collection. I have now, in the two following volumes, completed the plan I originally formed in my own mind; which was, to give the hiſtory of all the cauſes that took their riſe at the laſt General Election, as well as of thoſe, which, being occaſioned by accidental vacancies, ſhould happen to be tried during the ſame ſeſſions with the others. Though I can ſay, without affectation, that I am conſcious the imperfections of the foregoing part would require an apology for this continuation, yet I do not mean to trouble the reader with any. The beſt perhaps, I could offer, would only be the common excuſe of the encouragement of my friends: a ſpecies of encouragement, which authors, from a pleaſing, but often fatal illuſion, are too apt to miſtake for the voice of the Public.

The principal intention of this Preface is to make the reader acquainted with ſome of the eſtabliſhed rules relative to the preſentation of petitions complaining of undue elections, on the ſecond, or any ſubſequent ſeſſion of Parliament, after a General Election.

I. The annual order mentioned in the Introduction (1), is always expreſſed in the ſame words, whether in the firſt, ſecond, or other ſubſequent ſeſſion of a Parliament: *viz.*

(1) *Supra*, vol. i. p. 22, 23.

Ordered, "That all perſons who will queſtion "any returns of members to ſerve in Parliament, "do queſtion the ſame within fourteen days next, "and ſo within fourteen days next after any new "return ſhall be brought in." (1).

But the conſtruction is this: On the ſecond or any ſubſequent, ſeſſion, no petitions can be received, even within the fortnight, unleſs, 1. Where the ſame election has been complained of, in the foregoing ſeſſion, and the cauſe has not been tried; which happens when the day fixed for taking the firſt complaint into conſideration has been poſterior to the riſing of the Parliament; 2. Where, in the caſe of a vacancy, there has not been, in the preceding ſeſſian, a fortnight between the time when the return was brought in, and the end of the ſeſſion; 3. When the election complained of has taken place, in conſequence of a vacancy, between the two ſeſſions, or after the commencement of the new one.——In the firſt ſeſſion of this Parliament, an inſtance occurred of the great rigour with which the Houſe adheres to the limitation in the caſe of original petitions (2). In the laſt, the like ſtrictneſs was obſerved with reſpect to the preſenting a new petition, complaining of an election which had been already petitioned againſt. The Honourable George Keith Elphinſtone had, in the former ſeſſion, preſented a petition, queſtioning the election of the ſitting member for the county of Dunbarton, in Scotland (3); but there was no trial of the cauſe before the Parliament roſe. In the mean time, Mr. Elphinſtone, being a captain in the navy, was obliged to go abroad on the King's ſervice. The annual order of limitation for the laſt

(1) Votes, 5 Dec. 1774, p. 5, and 27, Oct. 1775, p. 9.
(2) *Supra*, vol. i. p. 42, 43.
(3) 12 Dec. 1774. Votes, p. 66.

laſt ſeſſion was made on the 27th of October, 1775. On the 10th of November, the laſt day of the fortnight, Captain Elphinſtone was not returned; but Mr. Seton, who had been his agent on the former occaſion, offered to give information to the Houſe, touching his intention of renewing his petition, and of the time of his going to ſea, and of his being at that time abroad on his Majeſty's ſervice. A motion, however, being made, and the queſtion put, for Mr. Seton's being called to the bar, and examined, it paſſed in the negative. Then a motion being made, and the queſtion put, "That the "Honourable George Keith Elphinſtone be allowed "fourteen days more, from this day, to preſent his "petition to the Houſe, complaining of the electi-"on and return of Sir Archibald Edmondſtone, "Baronet," (the ſitting member): this too paſſed in the negative (1.)

It ought, however, to be obſerved, on this caſe, That Mr. Seton did not produce any authority from Captain Elphinſtone, to appear as his agent, or to make an application for longer time in his name: That it was on this ground, that the motion for examining *him*, was rejected: That the queſtion produced a diviſion: And that, after all, many of Captain Elphinſtone's friends, in the Houſe thought that he might ſtill apply *himſelf*, for leave to petition, on his return to England, and that the Houſe would grant it. In fact, although he returned ſoon afterwards, he never made any ſuch application.

II. When a new petition is preſented, complaining of an election already petitioned againſt in the former ſeſſion, the new petition muſt be *the ſame in ſubſtance* with the former; that is, it muſt not contain any new allegations. If it does, it will not be received. On a moment's reflection it will be evi-

(1) 10th Nov. Votes, p. 70.

dent, that this rule is neceſſary, in order to give to perſons in poſſeſſion of ſeats in Parliament, the full advantages intended by the order for the limitation of the time of petitioning againſt them; and, though, I believe, there is no general reſolution or order for it, it is underſtood to be the eſtabliſhed law of Parliament, and has been ſo for at leaſt near a century. See the Caſes of St. Ives, (14th December, 1694 (1).) Reading, (15th of the ſame month, (2).) Wigan, 31ſt January, 1699—1700 (3),) and Mitchel (5th and 6th March, 1699—1700 (4);) in which the Committees of privileges and elections were diſcharged from proceeding on renewed petitions, becauſe they were not the ſame in ſubſtance with thoſe originally preſented. The reader will recollect, that after the cauſe concerning the validity of the *return* for the borough of Morpeth had been decided laſt year, leave was given to Mr. Eyre, and the electors, to petition, within a fortnight from the time of the deciſion, on the merits of the election; and that accordingly, Mr. Eyre did preſent a petition on the merits (5). The day fixed for taking his petition into conſideration, was the 12th of July, 1775. Before that time the Parliament roſe. He therefore had liberty to re-petition at the beginning of the laſt ſeſſion, and actually did ſo, on the 31ſt of October, 1775; when an order was made for taking his new petition into conſideration on the 26th of January following (6). On comparing this petition with that of the former ſeſſion, it was thought to contain certain new allegations (7). Upon this, it was

(1) Journ. vol. xiii. p. 62. col. 2. p. 63. col. 1.
(2) Same vol. p. 64. col. 2. p. 83. col. 1, 2.
(3) Same vol. p. 162. col. 2.
(4) Same vol. p. 268. col. 1. p. 271. col. 2.
(5) *Supra*, vol. i. p. 77.
(6) Votes p. 33.—(7) Compare the two petitions, 8th Feb. 1775, Votes, p. 196; and 31ſt Oct. 1775, Votes, p. 32, 33.

was moved in the Houſe, on the 23d of November, 1775, that a Committee ſhould be appointed to examine, whether the two petitions of Mr. Eyre, were the ſame in ſubſtance; and, after ſome debate on the ſubject, a Committee was appointed. One of the objections urged againſt the appointment of this Committee was, That the matter was taken up too late; that the difference (if there really was a ſubſtantial difference) between the two petitions, ſhould have been obſerved when the laſt was preſented; that now, a day, for chuſing a Committee to try the cauſe, having been fixed, the Houſe could no longer take any original cogniſance of the matter; but that it ſhould be left to the Committee to be choſen under Mr. Grenville's act, to diſcover the ſuppoſed variance, and report it to the Houſe. This objection was over-ruled; and, as it ſhould ſeem, with reaſon, becauſe it is as juſt, that the Houſe, after a new petition has been received, and a day named for taking it into conſideration, ſhould be able, on the ſuggeſtion of an eſſential variation from the former, to take the proper meaſures for enquiring into that point, and, if neceſſary, for diſcharging entirely the order appointing a day for taking it into conſideration, as that, after ſuch order, they ſhould have it in their power to put an end to the cauſe, by giving leave to the party to withdraw his petition.—The very day after the Committee of enquiry was appointed in the preſent caſe, Mr. Eyre applied for, and obtained, leave to withdraw his; upon which, the order appointing the Committee of enquiry was diſcharged (1).

III. The laſt rule I ſhall mention is with regard to caſes where, the ſame perſon being returned for two places, there is a petition againſt his election for one

(1) Votes, 24th November, 1775, p. 122.

one of them. Such perſon cannot chooſe which he will ſerve for, till the merits of the election complained of are decided; becauſe, till then, it cannot be aſcertained, that he was legally choſen for both places. It is improper that a perſon who has been thus *double-returned* ſhould, in any inſtance, make his option before the fortnight for petitioning is expired, becauſe till then *either* of his elections may be complained of; and if, on a complaint concerning one of them, it ſhould be decided, that ſuch election was void, he would be under a neceſſity of repreſenting the other place. But the matter is carried ſtill farther. If a petition has been preſented in a former ſeſſion, againſt a perſon double-returned; and there has been no trial during that ſeſſion, the petitioners have a fortnight at the beginning of the next to renew their complaint: Now, in ſuch a caſe, although the member ſhould make his election to ſerve for the place where his right is *not* diſputed, yet the Houſe will not order a warrant for a new writ to fill the ſeat he may have declined, till the expiration of the fortnight; unleſs, perhaps, the former petitioners were themſelves to inform the Houſe that they wave their right, and do not intend to renew their petition.—In the firſt ſeſſion of this Parliament, ſeveral freeholders of the county of Weſtmoreland petitioned the Houſe, complaining of the election of Sir James Lowther, Bart., for that county (1). There was no trial of this cauſe before the end of the ſeſſion. On the 11th day of the fortnight, in the laſt ſeſſion, "The Speaker acquainted the "Houſe, that he had received a letter from Sir "James Lowther, who was prevented by illneſs "from attending his duty in the Houſe, to inform "him,

(1) 17th Dec. 1774. Votes, p. 91.

" him, that (having received information from the " ſeveral perſons who were the petitioners from " the county of Weſtmoreland in the laſt ſeſſion " of Parliament, that they will not renew their " petition) he, being choſen a knight of the ſhire " to ſerve in this preſent Parliament for the county " of Cumberland, and alſo a knight of the ſhire " for the county of Weſtmoreland, made his " election to ſerve for the ſaid county of Cum- " berland.

" And a motion being made, and the queſtion " being propoſed, That Mr. Speaker do iſſue " his warrant to the clerk of the Crown, to make " out a new writ for the electing of a knight of the " ſhire to ſerve in this preſent Parliament for the " county of Weſtmoreland, in the room of the " ſaid Sir James Lowther,

" The Houſe was moved, That the petition of " ſeveral freeholders of the county of Weſtmore- " land, who have thereunto ſubſcribed their " names, which was preſented to the Houſe upon " the 17th day of December, in the laſt ſeſſion of " Parliament, might be read.

" And the ſame was read accordingly.

" Then the queſtion being put, That Mr. " Speaker do iſſue his warrant to the clerk of the " Crown, to make out a new writ, for the electing " of a knight of the ſhire to ſerve in this preſent " Parliament for the county of Weſtmoreland, in " the room of the ſaid Sir James Lowther;

" It paſſed in the negative (1)."

The method here taken of communicating the intention of the former petitioners to drop their complaint, was not thought ſufficient to juſtify the Houſe

(1) 7th Nov. 1775. Votes, p. 53, 54.

House in ordering a new writ. There was no immediate information in the name of the petitioners themselves.—On the 13th of November, the fortnight being expired, and no renewed petition having been presented, a new writ was ordered for Westmoreland (2)

(2) Votes, p. 78.

XXV.

THE CASE OF THE BOROUGH OF PETERSFIELD, IN THE COUNTY OF SOUTHAMPTON.

☞ The day appointed for chooſing this Committee was Tueſday, the 14th of November, 1775; but the Houſe not being complete, according to the proviſions of the ſtatute (1), they were obliged to adjourn to the day following (2).

On Wedneſday, the 15th of November, the Committee was choſen, and conſiſted of the following Gentlemen:

John Elwes, Eſq; Chairman,	Members for	Berkſhire.
Earl Verney,		Bucks.
Earl of Tyrconnel,		Scarborough
Sir Henry Hoghton, Bart.		Preſton.
Viſcount Palmerſton,		Haſtings.
Hugh Boſcawen, Eſq.		St. Mawes.
Benjamin Langlois, Eſq.		St. Germains.
Thomas More Molyneux, Eſq.		Haſlemere.
William Drake, jun. Eſq.		Agmondeſham.
Hon. Thomas Villiers Hyde,		Chriſtchurch.
Charles Melliſh, Eſq.		Pontefract.
Sir William Bagot, Bart.		Staffordſhire,
George Bridges Brudenell, Eſq.		Rutlandſhire.
NOMINEES, *Of the Petitioner,*		
Hon. Thomas Howard,		St. Michael.
Of the Sitting Members,		
Bamber Gaſcoyne, Eſq.		Truro.

PETITIONER

The Honorable John Luttrel.

Sitting Members.

Sir Abraham Hume, Baronet. William Joliffe, Eſq.

COUNSEL.

For the Petitioner.

Mr. Mansfield, Mr. Lee.

For the Sitting Members.

Mr. Miſſing, Mr. Hardinge.

(1) *Vide* vol. i. Introd. Sect. 3. N° 11. p. 24.
(2) Votes, 14 Nov. p. 79.

THE CASE OF THE BOROUGH OF PETERSFIELD.

ON Thurſday, the 16th of November, the Committee being met, the petition of Mr. Luttrel was read, the entry of which in the Journals is *verbatim* as follows:

31 Oct. 1775. "A petition of the Hon. John Luttrel "was read, ſetting forth, That at the laſt election of "members to ſerve in Parliament for the borough of "Petersfield, Sir Abraham Hume, Baronet, *High ſheriff "for the county of Hertford*, William Joliffe, Eſq; and "the petitioner, were candidates; and that the ſaid Sir "Abraham Hume and William Joliffe, [(1) by them-"ſelves and their agents,] after the diſſolution of the laſt "Parliament, and the iſſuing of the writ for the election, "and previous to and during the poll, by themſelves and "their agents, and by other ways and means, on the be-"half, and at the charge, of the ſaid Sir Abraham Hume "and William Joliffe, did give, preſent, and allow, to "the electors of the ſaid borough, and to ſeveral perſons "who had or claimed a right to vote in the election for "the ſaid borough, money, meat, drink, reward, en-"tertainment and proviſion, in order to procure them-"ſelves to be elected for the ſaid borough, in open de-"fiance of the law; and that the ſaid Sir Abraham Hume "and William Joliffe, previous to and during the poll,

(1) Theſe words are repeated twice, but this ſeems to be a miſtake of the printer of the Votes.

"were

" were guilty of bribery and corruption, and attempting " to bribe and corrupt thoſe who had a right to vote in the " ſaid election, in order to procure themſelves to be re- " turned as perſons duly elected, and that James Showell, " pretending to be the mayor of the ſaid borough, acted " partially and unfairly in the execution of his office, as a " returning officer, during the ſaid poll, in rejecting good " votes for the petitioner, and admitting bad ones for the " ſaid Sir Abraham Hume and William Joliffe, and in " many other reſpects; and that, by the ſaid and other " undue means, the ſaid Sir Abraham Hume and William " Joliffe obtained a majority of votes on the poll, and were " returned accordingly to ſerve in Parliament for the ſaid " borough, in prejudice of the petitioner (who was duly " elected, and ought to have been returned) and the legal " electors of the ſaid borough, and in open defiance of the " law and freedom of elections; and therefore praying the " Houſe to take the premiſes into conſideration, and to " grant him ſuch relief therein, as ſhall upon examination " appear to be juſt (2)."

Then the laſt determination of the right of election was read, which is as follows:

9 May, 1727. Reſolved, " That the right of election of " burgeſſes to ſerve in Parliament for the borough of " Petersfield in the county of Southampton, is in the " freeholders of lands, or ancient dwelling-houſes or " ſhambles built upon ancient foundations, within the " ſaid borough (3)."

Then the ſtanding order of 16th Jan. 1735-6, was read (4).

The counſel for the petitioner informed the Committee, that they did not mean to litigate the right of election, and that they therefore thought it unneceſſary that either the laſt determination or ſtanding order ſhould be read. However, it appeared to the Committee to be the eſtabliſhed and regular practice to read both, in all caſes where there is a laſt determination.

(2) Votes, p. 27, 28.
(3) Journ. vol. xx. p. 861. col. 2.
(4) *Supra*, vol. i. p. 51.

The counſel for the petitioner opened their caſe by acquainting the Committee that they intended,

1. To object to Sir Abraham Hume, that, being high ſheriff for the county of Hertford at the time of the election, he was ineligible, and that notice thereof having been given to the returning officer and to the electors, the votes given for him were thrown away.

2. To *both* the ſitting members, that they had been guilty of corrupting the voters by gifts and promiſes after the vacancy, and iſſuing out of the writ, by which means the election of them was void by virtue of the Statute of King William (5).

The counſel for the ſitting members inſiſted, that it was not competent to thoſe on the other ſide to go into the queſtion concerning the ſuppoſed ineligibility of Sir Abraham Hume as ſheriff of Hertfordſhire, becauſe there was no *expreſs* allegation or complaint on that ſubject in the petition.

They ſaid, That the words "*High Sheriff for the county of Hertford*," appeared in the petition merely as an *addition* or *deſcriptio perſonæ*. That there was no complaint on that account which could either lead Sir Abraham Hume to think that he was to be attacked on that ground, or indeed entitle the Committee to enter upon ſuch a queſtion, ſince it could not be conſidered as any part of the merits of the petition: That in every court of juſtice it is a rule that the plaintiff who complains of injuſtice, and ſues for redreſs, ſhall not, on the trial, be permitted to take up a new cauſe of complaint which has not been ſet forth in the inſtrument by which he made his firſt application to the court. That this rule is as juſt as it is invariable, being calculated to prevent a ſurprize on the defendant, who, if he had not previous notice of every charge meant to be brought againſt him, might loſe his cauſe for want of an opportunity to prepare his defence.

To this the counſel for the petitioner anſwered,

That the fact was clearly ſtated. That the petitioner had a right to avail himſelf of every thing that appeared on the face of the petition. That it was certainly unneceſſary for him to tell the Houſe in his petition, that Sir Abraham Hume, being ſheriff, was thereby ineligible. That it was

(5) 7 Will. III. cap. 4.

more

more proper to leave the law to be declared by the decision of the Committee. That nobody could suppose that the words by which the circumstance of Sir Abraham Hume's being sheriff of Hertfordshire is mentioned, were inserted merely as a title or description, such addition of the office of a sitting member never being used in petitions, because altogether unnecessary. That the petitioner, for instance, had never dreamed of describing the other sitting member by his office of one of the Commissioners of the Board of Trade. That Sir Abraham Hume, therefore, could not pretend surprise; especially as they were, they said, ready to prove that the objection to his eligibility was taken at the election, and the returning officer and electors warned, that votes given for him would be thrown away, and that his being sheriff would be made the ground of a petition to the House of Commons. That if a sitting member were stated in a petition to be a traitor or felon convict, an idiot, &c. in the form of words used in the present instance, it could never be contended, that a Committee to whom such petition should be referred, ought to shut their eyes to a legal disability, and declare such traitor, felon, or idiot duly elected, because the words, "*and therefore ineligible*," or others to that effect, were not added.

The counsel did not speak at great length to this objection (6). When they were directed to withdraw, the Committee deliberated for a considerable time, and then the counsel being called in, the Chairman informed them, that the Committee had come to the following resolution:

Resolved, "That the counsel be not permitted to argue "the point of the ineligibility of Sir Abraham Hume as "High Sheriff of the county of Hertford, the same in- "eligibility not being an allegation in the petition." (A)

The counsel for the petitioner then called three or four witnesses, to prove that gifts and promises had been made by Mr. Joliffe, in the presence, and with the concurrence of the other sitting member. In their opening they did not allege that they could on this ground bring the majority of votes, as against either the sitting members, to be in favour of Mr. Luttrel. The object, therefore, of the evidence, was to make the election void as to one, or both.

(1) *Vide infra*, Case of Southampton.

In the courſe of this evidence, one John Newman was called to prove a declaration made to him by one Brackſtone, a voter, about having got the promiſe of a houſe from Mr. Joliffe for his vote.

On the part of the ſitting members this evidence was objected to.

It was ſaid, that although the declaration (not upon oath) of a perſon who cannot be *obliged* to be a witneſs on the ſubject himſelf, is admiſſible in evidence to *affect ſuch perſon*, yet it is not admiſſible as againſt a third party, and that as the counſel for the petitioner had not ſaid that they meant to diſqualify voters, but only to affect the ſitting members perſonally, by promiſes, gifts, &c. which they had made, the evidence could not be admitted for that purpoſe.

It was anſwered by the counſel for the petitioner, That they were not obliged to anticipate the intent and purpoſe of the evidence they produced. That what they now offered, was certainly competent in an election cauſe. And that the Committee, after they ſhould hear it, would judge to what uſe it ought to be applied.

The Committee, after deliberation,

Reſolved, "That the evidence offered could not be admitted in ſupport of any charge againſt Sir Abraham Hume or Mr. Joliffe."

The counſel for the petitioner then ſaid they would aſk the ſame queſtions, with a view to diſqualify Brackſtone.

Which they were allowed to do.

On Thurſday, the 16th of November, being the ſame day on which the cauſe began, the Committee, by their Chairman, informed the Houſe, that they had determined,

That the two ſitting members were duly elected (7)

(7) Votes, p. 87. 88.

NOTES

NOTES

ON THE CASE OF

PETERSFIELD.

PAGE 5. (A) In the Caſe of Sudbury, in 1770, there is the following entry in the Journals.

15 Feb. 1770. " The counſel for the petitioners having propoſed to produce evidence, in order to prove, that ſeveral of " the perſons who voted for the ſitting members at the laſt " election, were not legally qualified to give their votes, as not " being freemen of the ſaid borough ;

" The ſame was objected to by the counſel for the ſitting " members, as not being warranted by any allegation in either " of the petitions.

" This point being agreed, and the counſel directed to withdraw ;

" And a motion being made, and the queſtion being put, " that the counſel for the petitioner be admitted to produce " evidence, to prove that many of the perſons who voted for " the ſitting members at the laſt general election for the borough " of Sudbury, were not legally entitled to vote for members " to ſerve in Parliament for the ſaid borough, there being no " allegation in either of the petitions preſented to this Houſe to " warrant their producing ſuch evidence,

" It paſſed in the negative (1)."

To confine the plaintiff in an election cauſe to the allegations in his complaint, would be a practice analogous to the rules of the ordinary courts of juſtice, and would not be attended with any hardſhip to him, for he has it in his power to make his petition as comprehenſive as he thinks fit. However, the rules of the courts of Weſtminſter Hall cannot be adopted on all occaſions by Committees, becauſe of the eſſential differences in the nature of the cauſes which they have to decide ; and I confeſs there are difficulties attending this rigid adherence to the

(1) Journ. vol. xxxii. p. 705. col. 1.

petitioner's

petitioner's complaint as ſet forth in the petition.---Perhaps the repreſentative body at large is in ſome reſpect to be conſidered as a party concerned in every controverted election. By their oath, the Committee are to ſwear, that they will well and truly try the *matter of the petition referred to them*. According to the ſtrict ſenſe of theſe words, if ſuppoſed to deſcribe the limits of their juriſdiction, they are bound to confine themſelves to the allegations of the petition. But, after the oath, the ſtatute goes on to ſay, "and they ſhall be a Select Committee to try "and determine the *merits of the return, or election*, appointed "by the Houſe to be that day taken into conſideration:" and "afterwards, (in § 18,) The ſaid Select Committee ſhall try "and determine the merits of the return, or election, or both." Do not theſe words ſeem to impower the Committee to inquire into, and decide upon every thing material to the merits of the return and election, whether ſpecified in the petition or not? Now the Houſe of Commons at large has an intereſt that no candidates but thoſe who were eligible and legally choſen, be declared duly elected by the determination of the Committee; and the eligibility of a candidate, whether that makes part of the matter of the petition or not, is certainly part of the merits of the election and return. Indeed, that Committees are not confined *ſtrictly* to the matter of the petition (although that alone is mentioned in their oath) is clear from this, that they hear and determine upon the caſe which the ſitting member chooſes to make againſt the petitioner, although the oath has no reference to any thing of that ſort. Suppoſe for a moment, that a ſheriff is clearly ineligible by law, or rather let us take the caſe of a perſon who at his election is poſſeſſed of a new office, within the meaning of the ſtatute of Queen Anne (1), ſuch a perſon is, by that ſtatute, ineligible. Suppoſe a petition is preſented complaining of his election, but without alleging that he held a diſqualifying office, or was incapable of being choſen. If it came out in the courſe of the evidence given on other points, that he held the office, can the Committee, who, we will ſuppoſe, have found all the points litigated by the petitioner to be in favour of the ſitting member, determine that ſuch ſitting member was *duly elected*. Suppoſe the petition has ſtood over for a year, and has not been renewed within the limited time (2) in the next ſeſſion, and in the mean time he has diveſted himſelf of his office, there can be no *new* petition againſt his election, and therefore no Committee can be choſen to try it on the ground of his ineligibility. He is *now* capable of *ſitting*. So that there can be no motion or enquiry in the

(1) 6 Anne, cap. vii. § 25.
(2) *Supra*, Pref.

Houſe

Houſe on that ground; and ſince Mr. Grenville's act, it ſeems to be the univerſal opinion, that no queſtion can be moved in the Houſe relative to the validity of an *election* which has been complained of by petition. Perhaps, if an ineligible perſon were returned, and *no petition* were preſented, the Houſe ſtill might take cognizance of it; for it would be too much to ſay, that ſuch a return could not be inquired into, although againſt the law of the land, unleſs ſome individual, intereſted as a voter or candidate, choſe to petition on the ſubject. But, in the inſtance we have put, a perſon incapacitated by poſitive ſtatute, will retain his ſeat, merely becauſe the individual or individuals who petitioned againſt him, either by neglect or deſign, did not allege the incapacity in their petition. Perhaps theſe obſervations may merit ſome attention, if it ſhould be thought expedient to make any farther alterations in the ſtatute of 10 Geo. III.

XXVI.

THE

CASE

Of the TOWN and PORT of

SEAFORD.

In the County of SUSSEX.

The Committee was choſen on Friday, the 17th of November, and conſiſted of the following Gentlemen:

	Members for
Hon. George Venables Vernon, Chairman,	Glamorganſhire.
Hon. James Murray,	Perthſhire.
Charles Amcotts, Eſq;	Boſton.
Hon. Charles Greville,	Warwick.
George Bridges Brudenell, Eſq.	Rutlandſhire.
Sir John Palmer, Bart.	Leiceſterſhire.
William Drake, Eſq; ſen.	Agmondeſham.
Sir Henry Paulett St. John, Bart.	Hants.
George Clive, Eſq.	Biſhop's Caſtle.
William Ewer, Eſq.	Dorcheſter.
John Peach Hungerford, Eſq;	Leiceſterſhire.
Ambroſe Goddard, Eſq.	Wiltſhire.
Richard Aldworth Neville, Eſq.	Grampound.
NOMINEES.	
Of the Petitioners.	
Sir George Younge, Bart.	Honiton.
Of the Sitting Members,	
John Moreton, Eſq.	Wigan.

PETITIONERS,

Stephen Sayre, Eſq; and John Chetwood, Eſq;

Sitting Members

William Hall, Lord Viſcount Gage, in the Kingdom of Ireland.
George Medley, Eſq;

COUNSEL.

For the Petitioners.

Mr. Lee, Mr. Alleyne,

For the Sitting Members.

Mr. Mansfield, Mr. Cox,

THE

CASE

OF THE TOWN AND PORT OF

SEAFORD,

ON Saturday, the 18th of November, the Committee being met, the petition was read, ſetting forth, That many perſons duly qualified tendered their votes for the petitioners, but were rejected; by which means, on caſting up of the poll, there appeared a majority for the ſitting members; whereas, if they had not been arbitrarily, partially, and illegally rejected, there would have been a great majority in favour of the petitioners (1).

The laſt determination of the right of election was then read, and appeared to be entered in the Journals in the following words:

10 Feb. 1670-1. "Sir Job Charlton reports from the "Committee of elections, the ſtate of the caſe, and evi- "dence, touching the election for the town of Seaford in the "county of Suſſex, and the queſtion thereupon ariſing; "whether the right of election were in the bailiff, jurors, "and freemen only; or, in the populacy; and that the "Committee were of opinion, *That the bailiff, jurors, and* "*freemen, had not only voices in election, but that the election* "*was in the populacy*; and that Mr. Morley was duly elect- "ed.

"The queſtion being put to agree with the Committee "—the Houſe divided;

"And it was reſolved in the affirmative (2.) (Majority 108 to 102).

(1) Votes, p. 29. 31 Oct. 1775.
(2) Journ. vol. ix. p. 200. col. 2.

After

After this entry had been read, the counſel for the ſitting members deſired that an explanatory reſolution made by the Houſe, in 1761, ſhould alſo be read. Thoſe on the other ſide ſhewed ſome reluctance to conſent to the reading of this laſt-mentioned reſolution, leſt, after it ſhould be read, the counſel for the ſitting members ſhould inſiſt that it was the *laſt determination*, within the meaning of the ſtatute, and thereby endeavour to preclude them from impeaching or contradicting it by evidence.

The Committee reſolved, That it ſhould be read, together with the entry of all the proceedings on the occaſion, but that its effect and operation ſhould remain open to argument.

The account of thoſe proceedings, in the Journals, is as follows:

10 Dec. 1761. "The Houſe proceeded to the hearing "of the matter of the ſeveral petitions (1) complaining of "an undue election and return for the town of Seaford in "the county of Suſſex.

"And the counſel were called in,

"And the ſaid petitions were read.

"And the laſt determination of the Honſe, made upon "the 10th day of February, 1671, concerning the right of "electing (A) Barons to ſerve in Parliament, for the town "and port of Seaford, in the county of Suſſex, (whereby "it was reſolved, that the bailiff, jurors, and freemen had "not only voices in the election, but that the election was "in the populacy) was alſo read.

"And one of the counſel for the petitioner was heard, and "inſiſted, That in the ſaid determination of the Houſe, the "words "*bailiff*, *jurors*, *and freemen*," mean ſuch bailiff, "jurors, and freemen only, as are reſident within the ſaid "town and port of Seaford, being maſters of families, and "not receiving alms.

"Then one of the counſel for the ſitting members was "heard.

"And then the counſel on both ſides were directed to "withdraw.

"They were again called in.

(1) For the petitions, *vide* Journ. vol. xxix. p. 19. col. 1. 17 Nov. 1761.

"And

" And the counſel for the petitioners having propoſed to " produce evidence, in order to ſhew that the words " *bailiff*, " *jurors, and freemen*," mentioned in the ſaid determination of " the Houſe of the 10th day of February, 1670, mean on- " ly ſuch bailiff, jurors, and freemen, as are reſident with- " in the ſaid town and port ;

" And the counſel for the ſitting members having object- " ed to the admiſſion of that evidence, as being contrary to " the ſaid determination of the Houſe : And having been " heard upon their ſaid objection :

" The counſel for the petitioners were heard in anſwer " thereto.

" And then the counſel on both ſides were again directed " to withdraw.

" And a motion being made, and the queſtion being put, " that the counſel for the petitioners be admitted to give evi- " dence, to ſhew, That in the ſaid determination of the " Houſe, the words " *bailiff, jurors, and freemen*," mean " ſuch bailiff, jurors, and freemen only, as are reſident " within the ſaid town and port ;

" It paſſed in the negative."

" And the counſel were again called in,

" And Mr. Speaker acquainted them with the ſaid reſo- lution (1)."

11 Dec. 1761. " The order made this day for reſum- " ing the further hearing of the matter of the ſeveral petiti- " ons complaining of an undue election and return for the " town of Seaford in the county of Suſſex, at half an hour " after three of the clock this afternoon, being read;

" The Houſe proceeded to reſume the further hearing of " the matter of the ſaid petitions.

" And the counſel were called in ;

" And the couuſel for the petitioners proceeded in ſupport " of their conſtruction of the word " *populacy*" in the laſt " determination of the Houſe, concerning the right of elec- " ting Barons to ſerve in Parliament for the town and port " of Seaford aforeſaid, made the 10th day of February, " 1670.

" Then the ſaid counſel examined ſeveral witneſſes, in " order to prove that the inhabitants at large have, by uſage, " voted at elections of Barons to ſerve in Parliament for the " ſaid town and port.

(1) Journ. vol. xxix. p. 83. col. 1, 2.

" Then

" Then the original poll taken at the election of Barons " to ſerve in Parliament for the ſaid town and port, in the " year 1747, was produced by the town clerk of the ſaid " town and port.

" And the counſel for the petitioners having offered to " produce the corporation-book, in which are entered the " acts of the ſaid corporation;

" And the counſel for the ſitting members having objected " to the producing of the ſaid book as evidence, in relation " to any other matter than the acts of the ſaid corporation;

" The counſel for the petitioners were heard, in anſwer " to the ſaid objection;

" And the counſel for the ſitting members being heard by " way of reply;

" The counſel on both ſides were directed to withdraw.

" They were again called in.

" And the counſel for the petitioners not inſiſting on pro- " ducing the ſaid corporation-book;

" Several parts of the ſaid original poll were read:

" And then the counſel on both ſides were again directed " to withdraw (1)."

The further hearing of the cauſe was again adjourned till Tueſday, the 15th of December.

15 Dec. 1761. " The Houſe proceeded to the further " hearing of the matter of the ſeveral petitions, complaining " of an undue election and return for the town of Seaford, " in the county of Suſſex.

" And the counſel for the petitioners having gone through " his evidence, in ſupport of his conſtruction of the word " *populacy*," in the laſt determination of the Houſe, con- " cerning the right of electing Barons to ſerve in Parliament " for the port of Seaford aforeſaid, made the 10th day of " February 1670;

" The counſel for the ſitting members were heard in " anſwer thereto; and inſiſted, That the word " *populacy*" " in the ſaid determination of the Houſe, means, inhabi- " tants, houſekeepers, paying ſcot and lot.

" And the ſaid counſel examined a witneſs in ſupport of " their ſaid conſtruction.

" And the counſel for the petitioners having be heard " by way of reply.

(1) Journ. vol. xxix. p. 84. col. 1, 2.

" The

" The counſel on both ſides were directed to withdraw.

" Reſolved, That in the laſt determination of this " Houſe, of the right of election of barons to ſerve in Par- " liament for the town and port of Seaford, in the county " of Suſſex, made the 10th day of February, in the year " 1670; which is as followeth, *viz.* " That the bailiff, " jurors, and freemen, had not only voices in the election, " but that the election was in the populacy;" the word " *populacy*" therein mentioned, extended only to *the inha-* " *bitants, houſekeepers of the ſaid town and port, paying ſcot* " *and lot* (1)."

After theſe entries from the Journals, the ſtanding order of 16 Jan. 1735-6 was read (2).

The counſel for the petitioners then opened the whole of their caſe, which conſiſted of two general points.

1. The firſt was, That the explanatory reſolution of 1761, was inconſiſtent with the true ſenſe of the determination of 1670, which was the *laſt* determination of the Houſe, when the ſtatute of 2 Geo. II. cap. 24. took place, and therefore final to all intents and purpoſes; and not to be overturned or altered by any reſolution ſubſequent to the ſtatute.

2. The ſecond, That, if the Committee ſhould think, agreeable to the reſolution of 1761, that the electors diſtinguiſhed by the word " *populacy*" in the reſolution of 1670, muſt be *ſcot and lot men*, yet, to bring them within that deſcription, it was not neceſſary that they ſhould be actually rated to the poor.

The counſel for the ſitting members objected to their being permitted to bring evidence to contradict the explanatory reſolution of 1761, and this point was ſeparately argued, and determined by a ſpecial reſolution of the Committee.

COUNSEL for the Petitioners.

When a laſt determination is ſufficiently clear, or admits of a conſtruction conſonant to general principles, and the common law of Parliament, it would be highly dangerous to allow of explanatory reſolutions contradictory to, or inconſiſtent with, ſuch conſtruction. The certainty and ſecurity which the legiſlature meant to provide by the ſtatute of Geo. II. might be entirely evaded by ſuch pretended explanations. " *Populacy*" is a word of general import; and the fair me-

(1) Journ. vol. xxix. p. 89. col. 2. p. 90. col. 1.
(2) *Supra*, vol. i. p. 51.

thod

thod of conſtruing it in the determination of 1670, is to apply it to ſuch perſons as, by the common law, where there is no charter or preſcription to the contrary, are the legal electors for boroughs. Theſe are the inhabitants houſeholders (1). That ſuch is the ſenſe in which the word was underſtood at Seaford, from the date of the determination in 1670 to the year 1761, can be proved by the conſtant uſage of the place during that long period of time. Indeed, the ſucceſsful party in 1761, and the Houſe in making their deciſion, ſeem to have been ſo ſtrongly impreſſed with this ſenſe of the word "*populacy*," that even in taking in the qualification of the payment of ſcot and lot, they added that of being houſekeepers. This would have been unneceſſary if they had conſidered Seaford as a common ſcot and lot borough; for to be a houſekeeper is no neceſſary part of the deſcription of a ſcot and lot man. Occupancy, even without inhabitancy, is ſufficient to conſtitute that character (2).

If the word "*populacy*" can receive an interpretation agreeable to the common law right of election, if the uſage of Seaford for a whole century ſhows that it was ſo underſtood in the borough, an explanatory deciſion *of the old judicature* conſtruing the term otherwiſe, ſo far from being conſidered as concluſive, will be thought to deſerve very little regard from this Committee.—The Hiſtory of the Caſe of 1761 is recent, and it is well known to have been a very flagrant inſtance of the influence of the miniſter of that day.

COUNSEL for the ſitting members.

When a word of doubtful ſenſe (which "*populacy*" (B) ſeems to be admitted to be) is employed in a laſt determination, and the Houſe, whoſe province it is to explain its own deciſions, makes an interpretation of ſuch ambiguous word in plain unequivocal language, the interpretation ought to be concluſive: It forms, as it were, part of the laſt determination, and is to be conſidered as ſomething equivalent to, and ſubſtituted in the room of, the former expreſſion. What would the conſequence be if a formal, explicit, and diſtinct, explanation by the Houſe of Commons, of an acknowledged ambiguity in a laſt determination, were to be conſidered as of no authority, but to remain liable to a freſh diſcuſſion and inquiry? Would not an opportunity be given, at every

(1) *Vide ſupra*, vol. i. Caſe of Pontefract, vol. ii. Caſe of Poole.

(2) *Vide ſupra*, vol. i. Caſe of Dorcheſter.

new

new election, of contending for a new meaning to be put on the doubtful expreſſion? and, with regard to the right of election in ſuch a caſe, would it not remain for ever expoſed to the uncertainty, and ſubject to the litigation, which the legiſlature, by the ſtatute of Geo. II. was ſo anxious to prevent?

If any uſe could be made on the preſent occaſion, of the common law right of election, the counſel for the petitioners have no right to aſſume it to be as they contend. The diverſity of ſyſtems on that head is well known, and the opinion of that great lawyer Lord Chief Juſtice Holt was very different from that which they would have the Committee to adopt (1).

If the reſolution of 1761 is to be conſidered as making part of the ſame determination with that of 1670, what the uſage of the borough may have been is of no conſequence, and all evidence on that ſubject is inadmiſſible.

After the counſel had finiſhed their arguments on this point, the Court being cleared, the Committee deliberated for ſeveral hours, and then adjourned till Monday.

On Monday, the 20th of November, after deliberating again for ſome time, the following queſtion was put:

"That the Committee do permit the counſel for the petitioners to produce evidence to call in queſtion the reſolution of the Houſe of Commons in 1761, touching the right of election for the town and port of Seaford, by which reſolution the right of voting in the ſaid town and port, as in the *populacy*, is declared to extend only to the inhabitants, houſekeepers of the ſaid town and port, paying ſcot and lot, there having been a previous reſolution touching the right of election made in 1670."

And it was reſolved in the negative.

On which the counſel being called in, the Chairman acquainted them that the Committee had reſolved,

"That the counſel ſhould not be permitted to call evidence to contradict the reſolution of 1761 (C)."

2. The counſel for the petitioners proceeded to the ſecond point, and contended, that it is not neceſſary that perſons, in order to anſwer the deſcription of ſcot and lot men, ſhould actually be rated to, and pay, the poor-tax.

(1) *Vide* Caſe of Pontefract; *Supra*, vol. ii

It appeared, by the original poll, that the votes admitted by the returning officer were as follow; *viz.*

For Lord Gage - -	29
For Mr. Medley - - -	27
For the petitioners -	1

But it was proved by John Cæſar, who had acted as check-clerk for Sayre and Chetwood, that 47 perſons, a liſt of whom he produced, who tendered their votes for the petitioners, were rejected becauſe their names did not appear on the laſt poor-rate, according to which the returning officer took the poll. It appeared, alſo, that three others tendered their votes, and were rejected, after Cæſar had left the place of polling.

COUNSEL for the petitioners.

Though it is convenient that, in common caſes, the poor-rate ſhould be the criterion to fix who are to be conſidered as paying ſcot and lot, yet that the rate and payment of the parochial tax for the poor, is no neceſſary ingredient in the deſcription, or a condition *ſine qua non*, is moſt evident from this, that "*ſcot and lot*" were known to the law of England long before the poor-tax had any exiſtence. That tax took its riſe in the 43d year of Queen Elizabeth, and we find ſcot and lot mentioned at the time of the Conqueſt, as having exiſted among the Saxons, the words themſelves being of Saxon or Gothic origin. The expreſſion of "*ſcot and lot*" is found alſo in many ancient ſtatutes, and particularly in ſome, near, but before, the time when the firſt poor-laws were made, "*Scot*," *ſcottuni*, "*ſcotta*, and "*ſcottus*," are terms which occur frequently in Doomſday book (1). The recital of the ſtatute of 33 Hen. VIII. cap. 9. ſets forth, that the citizens and freemen of London were (at that time) ſworn to bear *ſcot* and *lot*. This clearly proves that thoſe terms had a diſtinct definite meaning at that period, which neceſſarily muſt have been different from a tax not known till ſome years afterwards. Spelman underſtands by "*ſcot and lot*" in the laws of William I. publick contributions, taxes, or tallages, in general. He cites the following paſſage in thoſe laws: "*Omnis Francigena*, "*qui tempore Edwardi propinqui noſtri fuit in Anglia parti-*

"*ceps*

(1) Spelman, title *ſcot* and *ſcottuni*.

" *ceps conſuetudinum Anglorum, quod dicunt an* ꝑlor & *an* " ſcore *perſolvatur ſecundum legem Anglorum.*" " *Hoc eſt*" " (ſays he) *ut omnes Francigenæ, etiam triumphatis jam An-* " *glis, eaſdem ſortes, eaſdem ſolutiones præſtarent quibuſcunque* " *tenerentur tempore Edwardi Confeſſoris*—Lor *autem ſors.*" And he adds, " *Nec obſolevit hodie omnino antiquum illud* " *adagium, nam qui pari ſorte, pariterque licet non æqualibus* " *portionibus*, in aliquam veniant contributionem, *dicuntur* " *ſæpius juxta* ſcor & lor *perſolvere.*"

In like manner, under " *title, Lot*," in the ſame author, that word is defined, " *Pars tributi ſive ſolutionis alicujus* " *quam inter alios quis tenetur præſtare.*"

Franciſcus Junius, in his *Etymologicum Anglicanum*, explains " *ſcot*" (or " *ſhot*," theſe being ſynonimous words) thus: *Cenſus, Vectigal, Tributum.* " *Item, ſymbola vel ſym-* " *bolum*, i. e. *portio quod ſinguli conferunt in ſumptus qui pub-* " *lice in hanc illamve rem faciendi ſunt.*"

Analogous to this general ſenſe of the word, " *ſhot*" is to this day a familiar expreſſion, particularly in the North of England, for the ſhare every man pays of the reckoning at a tavern.

It appears from the two learned authors juſt cited, that, anciently, whoever in general paid his ſhare of any contribution, was ſaid to pay ſcot and lot. Spelman, who wrote in the reign of James I. and Car. I. does not ſay a word of the expreſſion being appropriated or confined to the payment of the poor's-rate, which he moſt probably would have done, if it had been underſtood in that limited ſenſe in his time.

In ſhort, the phraſe of paying ſcot and lot, ſeems to have been uſed to deſcribe perſons who were not diſtinguiſhed by any particular rank or character, but who were ſufficiently independent to be able to pay their proportion of any general tax. Thus in *Magna Charta*, when the King ſays, " And " for this our gift and grant, &c. the Archbiſhops, Bi- " ſhops, Abbots, Priors, Earls, Barons, Knights, Free- " holders, *and other our ſubjects*, have given unto us the " fifteenth part of all the moveables (1)." " *Other our* " *ſubjects*," were thoſe who did not come under any of the higher claſſes there enumerated, but who were payers of ſcot and lot.

(1) Magn. Ch. cap. 37.

Watch and Ward was a general duty, to which by the old ſtatutes, the inhabitants of towns and boroughs were liable in their turns. See the ſtatute of 13 Ed. I. ſtat. 2. cap. 4. and the caſe of Stretton and Browne in Cro. Eliz. p. 204. By the ſtatute of 5 Hen. IV. cap. 3. It is particularly provided, "that watch ſhall be kept on the ſea-"coaſt, in the manner as was wont to be done in times "paſt." It will be proved, that, in time of war, this practice is ſtill continued at Seaford; and that, during the laſt war, perſons in like circumſtances with thoſe who have been kept off the rate, and whoſe votes were rejected, performed that duty. The uſage is, according to the ancient law, to watch by lot, each man taking his turn. This therefore is as good a criterion of a ſcot and lot man as the payment of the poor-rate (D).

Enough has ſurely been ſaid, at leaſt, to ſhew that, if there has been irregularity, partiality, and miſconduct in making the rate, the payment of the poor-tax not being eſſential to the idea of ſcot and lot, other circumſtances may be inquired into, and that, if upon inquiry it ſhall appear in the preſent caſe, that the perſons omitted in the rate were as capable of paying the parochial taxes as thoſe actually rated, the Committee ought to conſider them as ſcot and lot men, and to allow their votes.

The amount of the evidence to ſhew that the rates were irregularly and partially made, was as follows:

The Corporation of Seaford conſiſts of a bailiff, four jurats (or jurors, as they are called in the determination of 1670) of whom the bailiff is one, and an indefinite number of freemen. The jurats are choſen for life, and by their office are Juſtices of the peace for the borough

It appeared by the teſtimony of ſeveral perſons who had ſerved as overſeers of the poor, that they had not come into the office by a regular warrant of appointment, under the hands and ſeals of two or more of the juſtices, according to the directions of the ſtatute of Queen Elizabeth (1), but that the jurats had ſent them the books of rates, and the overplus pariſh-money, and told them, they were to be the overſeers for the year. That, in conſequence of this, they had taken the character upon them, and acted as overſeers.

In

(1) 43 Eliz. cap. ii. § 1.

In 1761, after the election, many persons who had claimed to vote at that election, were rated. Afterwards they were put off the rate. They had applied to the jurats and churchwardens in 1762, and in 1767, and 1768, before the general election, to be put on again, declaring that they were able and willing to bear the burthen, and therefore wished to be admitted to the exercise of the privileges to which that would intitle them. In 1762, Harrison, one of the jurats, said, "they would turn out and keep in just whom they pleased;" and, in 1767, the jurats said, "they would rate such as they liked." In 1768, Harrison and the other jurats being particularly applied to by twenty-five persons at a public house, he said, "he should not resolve his mind that night."

In 1774, on Michaelmas-day, which was previous to the election, the persons claiming to be rated applied to the overseers, and by their agent delivered to them a written notice subscribed with their names, intimating, that if they refused to put them on the rate, the court of King's Bench would be moved against them. It appeared that there was no new rate made then, but that the churchwardens and overseers had resolved at that time, if they made a rate, not to put the claimants on it. One of them asked Harrison, if they should make a rate; and he said, "They had no call to do it, as they had money in hand;" but neither he, nor any other of the jurats (who were all proved to have been in the interest of the sitting members) said any thing about leaving the claimants out, if a rate should be made; nor did either of the sitting members say any thing to that purpose. Lord Gage was present on Michaelmas-day when the application was made, and the notice delivered. It did not appear that any application had been made by the claimants at any time in the intervening periods *between* the elections, but only on occasion of the rates made *previous to* the general elections of 1768 and 1774. Harrison, the jurat, had advanced money to the overseers on account of the parish; but it appeared to be usual for the parish officers to borrow money on the credit of the rate, for the immediate use of the parish poor, and then to apply the money raised by the subsequent rate to the discharge of the debt.

One Edward Spice, who had voted for the sitting members as a housekeeper paying scot and lot, said, he was overseer

ſeer in 1772. That then Harriſon *ordered* him to make a book (or rate) according to the old one, which he had done. That he ordered him to make no alteration. That, if it had been left to himſelf, there were others, who were ready and willing, whom he would have put on, and that he had not put them on, becauſe it was contrary to the directions he had received from Harriſon, and the other jurats. He ſaid, Harriſon told him, "The fewer hands it is kept in, the "better for us."

In the books there were entries of the allowances of the rates by the jurats. Seven rates were produced: 1. To Eaſter, 1766. 2. To Eaſter, 1767. 3. To Michaelmas, 1768. 4. To Lady-day, 1769. 5. To Michaelmas, 1770. 6. To Lady-Day, 1773. 7. From Lady-day to Lady-day, 1774. It was admitted that no appeal had been made from any of thoſe rates, particularly not from the laſt, by which the poll was taken.

Such being the material circumſtances that were proved relative to the conduct of the overſeers and jurats in making the rates, there was no objection made either on the part of the ſitting members, or by the Committee, to the production of evidence concerning the circumſtances of the voters, as well thoſe who ſtood on the poll, as thoſe who had been rejected (1).

A great deal of evidence was, accordingly, brought on thoſe heads which it would be uſeleſs to ſtate at large. Edward Spice, whoſe teſtimony was moſt favourable to the caſe of the petitioners, went through the liſt of rejected voters, man by man, and ſaid, with regard to about thirty-two, that he ſhould have rated them in any other place. That he knew of no other reaſon why they were not rated, but to keep the right of voting in few hands. But he ſaid of all of them, unleſs about three, that they had no other means of ſubſiſtence but their work, as fiſhermen or day-labourers, and that his rule of judging was, that every man, "who *pays his way*," and who maintains himſelf and his family, is rateable. This appeared to be the criterion adopted by ſeveral other witneſſes, who alſo went through the liſt, and ſwore to the rateability of many of the rejected voters. It was proved, that many of thoſe voters had their

corn

(1) *Vide infra*, Caſe of Peterborough.

corn from the farmers conſiderably under the market-price; but this was ſhewn to be in conſequence of a ſort of general uſage in that part of the country in favour of labourers, and never conſidered as a matter of charity. All the rejected voters were proved to be houſekeepers. It was alſo proved that they paid the pariſh-clerk's fee, which is a groat a year from all houſeholders. One William Roberts ſwore, that perſons in *their* ſituation kept watch during the laſt war, but he could not ſay whether any of *them* did. Their houſes in general were proved to be worth from forty ſhillings to three or four pounds a year. Roberts ſaid, he did not know of any property being rated in Seaford under fifty ſhillings a year; and one Edward Vinall ſaid, he could not ſay that perſons in the circumſtances of the rejected voters had ever been rated. He ſaid, he could remember that, about forty years ago, only one perſon had relief in the pariſh.

One William Wood, who had tendered his vote for the petitioners, and was rejected as not on the rate, was declared by all the witneſſes to be a houſekeeper of very conſiderable ſubſtance.

On the part of the ſitting members, one John Raſon was called, who ſaid he lived in the neighbourhood of Seaford, on a farm of Mr. Medley's. That he had a farm at Seaford, and rented, all together, upwards of 300 l. a year. That he had at different times acted as a pariſh officer. That he knew many of the voters and claimants, and their ſituation. Being ſhown John Cæſar's liſt, he ſwore as to 26 out of the 47, that he ſhould not have thought them fit to be rated, if there had been no queſtion of an election. As to 17, he either ſaid he did not know them, or was unacquainted with their circumſtances. The remaining 4, he ſaid he ſhould have rated. It was a rule, he ſaid, in that neighbourhood, not to rate perſons who live merely by their labour. That at a place called Bourn, where he had been overſeer, they rated perſons down to 20 ſhillings a year, when known to be men of ſubſtance; but that there they would not rate a labourer, though he ſhould rent a houſe of 40 ſhillings a year.

It appeared, that about 14 of the voters for the ſitting members were cuſtom-houſe officers, or boat-men, by which they got about 30l. a year. That, excluſive of what they got

got in that way, ſeveral of them were in worſe circumſtances than ſeveral of the perſons who were not rated. It ſeemed to be admitted, that thoſe who were not cuſtom-houſe boatmen, were of ſufficient ſubſtance to be rated.

The rate by which the poll was taken, was proved by the pariſh clerk to have been regularly publiſhed (1).

COUNSEL for the ſitting members.

Scot and lot men are now univerſally underſtood to be perſons who contribute to the ordinary taxes of the pariſh; and the payment of the poor-rate is the eſtabliſhed criterion, and the only one that can be adopted. The practice of *watch and ward*, as it is directed to be performed by the ſtatutes of Wincheſter, and of 5 Hen. IV. has long fallen into diſuſe. If it exiſted, it could have nothing to do with the payment of ſcot and lot, being a ſort of duty to which men in all ſituations and circumſtances were equally liable; and for which nothing was to be paid. The ſame obſervation will apply to the kind of watch performed in time of war, at Seaford, by local cuſtom (D).

As to the ſuppoſed miſconduct of the pariſh-officers in making the rate, why was it not complained of in the regular manner? The law was open to thoſe who thought themſelves aggrieved. They ſhould have applied to the overſeers, *at the time when the rate was making*. If they had refuſed to comply with their demand, an appeal lay to the Juſtices, in their quarter-ſeſſions. Miſbehaviour in the Juſtices, on hearing the appeal, would have been open to puniſhment, by information, on an application to the court of King's Bench. It is no objection, that the overſeers had no regular warrants of appointment; for if perſons who take upon them that character, are guilty of miſconduct, they are anſwerable for it; and rates made by them, and acquieſced under, cannot afterwards be invalidated on the ground of irregularity in their appointment. It will be ſaid, perhaps, that it would have been labour loſt to appeal to the jurats, ſince the injury was done by them, the rates being made by their directions; and that this, in ſubſtance, would have been an appeal *ab iiſdem ad eoſdem*; but the law having

(1) 17 Geo. II. cap. 3. § 1.

having made them, as local Juſtices of the Peace, the regular court of appeal, this Committee will not *preſume*, that they would have been guilty of criminal partiality and injuſtice. Beſides, the appeal might have been made to the *county* Juſtices. The ſtatute of 17 Geo. II. (1) enacts, *affirmatively*, "That, in all corporations or franchiſes who "have *not* four Juſtices of the peace, it ſhall and may be "lawful for any perſon or perſons, in any of the caſes where "an appeal is given by this act, to appeal, if he or they ſhall "think fit, to the next general or quarter ſeſſions of the "peace for the county, riding, or diviſion, wherein ſuch "corporation or franchiſe is ſituate;" but it does not therefore follow, that where there *are* four local Juſtices, the appeal may not be carried to the county ſeſſions (E).

Upon the whole, as the perſons who were rejected at the poll becauſe they were not rated, never took the legal courſe for redreſs, this would have been a bar to their claim before this Committee, even if they could have ſhown that their circumſtances intitled them to be upon the rate. But the witneſſes have proved that, except three, none of them have any means of ſubſiſtence but their labour; ſo that if any accident were to deprive them of that reſource, they and their families muſt come on the pariſh. It has not been ſhown, that one of them was ever rated before 1761, before which period, the right of voting not being underſtood to depend upon the rates, it was clearly the intereſt of the pariſh officers to tax them, if they had been fit to be taxed.

The COUNSEL for the petitioners, in reply,

Denied that an appeal could have been made to the county juſtices (E); and they ſaid the partiality of the jurats had been clearly proved, ſo as to evince that an appeal to them would have been nugatory and fruitleſs. That the rateability of the rejected voters had alſo been proved, and that the Committee could, and was the only court that could, give them ſpecific relief, for the injury which had been done them (2).

On

(1) Cap. 38. § 5.

(2) Caſe of Weobly cited *ſupra*, vol. ii. *Vide infra*, Caſe of Peterborough.

CASE XXVI.

On Wednesday, the 22d of November, the Committee, by their Chairman, informed the House, that they had determined,

That the two sitting members were duly elected (1).

(1) Votes, p. 109.

NOTES

NOTES

ON THE CASE OF

SEAFORD.

PAGE 12. (A.) This town and port was originally a member of the port of Haſtings. It returned members to Parliament from the time of Edw. I. till 1 Hen. IV. and from that time ceaſed till 1640-1. Henry VIII. by a charter of the 30th year of his reign, added it to the Cinque Ports. 4 Feb. 1640-1 the Houſe reſolved, that Seaford ſhould be reſtored to its ancient privilege, and that a warrant ſhould iſſue for a writ for the electing and returning of two *burgeſſes*. (Journ. vol. ii. p. 78. col. 1.) Afterwards its members came to be called *Barons*, as thoſe of the other Cinque Ports; for which ſee Spelman's Gloſſary, Title, *Barones quinque portuum*.

P. 16. (B). In the caſe of Honiton, 3 Feb. 1710-11, cited in the caſe of Peterborough, *infra*,) the word "*populace*" is uſed, both by the parties, and the Committee, as different from "*inhabitants, houſeholders, paying ſcot and lot*," and ſynonimous to "*pot-wallers*." Journ. vol. xvi. p. 479. col. 2. p. 480. col. 1.

P. 17. (C). In the caſe of Haſlemere, (*ſupra*, vol. ii.) it ſeemed to be underſtood both by the parties and the Committee, that the explanatory reſolution of 24 April 1755, was concluſive. Its authority was not attempted to be denied on either ſide. The petitioners only endeavoured to interpret it in a manner which would have been favourable to their cauſe. Some people entertain an opinion, that a reſolution explanatory of a previous determination of the right of election, is itſelf a laſt determination within the meaning of the ſtatute, and to be conſidered as equally unimpeachable with any other laſt determination. They put this caſe. Suppoſe, on occaſion of a controverted election for a maiden borough, the queſtion between the parties to be, whether one particular claſs of men have a right to vote; as, for inſtance, in this borough of Seaford, ſuppoſe the queſtion in 1679 had been merely, whether *the Jurors* had or had

had not a right to vote, and the Committee and Houſe had reſolved, "That the jurors of the town of Seaford have a right "to vote for members to ſerve in Parliament for the ſaid town," this, as far as it went, would have been final ſince 2 Geo. II. But if, in ſome ſubſequent cauſe the right of *the freemen* had been diſputed, and the Houſe then had reſolved, "That not "only the jurors, but alſo the freemen have a right to vote," this ſecond reſolution would, with regard to the right of the freemen, have been equally final by the operation of the ſtatute, as the former. In the ſame manner, there might have been at different times, reſolutions concerning the right of the bailiff, and that of the populacy. This, which they hold to be uncontrovertible, ſhews that there may be ſeveral determinations of the Houſe, at different times, with regard to the right of voting in the ſame place, on all of which the ſtatute may attach, ſo as to render each of them final; the whole together forming, as it were, one general complete determination. Now, if this is true, they argue that it is equally reaſonable that if (in a determination purporting to deſcribe all who are entitled to be electors, and on which the ſtatute has attached) one ſet of electors are ſpecified in words of a doubtful ſignification, a new reſolution, explaining thoſe words, ſhould be looked upon as final, and forming part of the original determination; for, till it is clearly aſcertained what particular claſs of men was meant the right of election *quoad* them, is to be conſidered as not yet determined. There is, however, a manifeſt difference in the two caſes; and perhaps the utmoſt weight that ought to be given to a reſolution explaining words of a laſt determination, is that which would be given, in Weſtminſter Hall, to the deciſion of a court of law, interpreting doubtful words in an act of Parliament. Such explanatory deciſion, if made on due deliberation, and not incongruous or repugnant, would be held to be binding in ſubſequent caſes; and, ſuppoſing the act to have been calculated for any particular place, evidence would not be received to ſhow, that, in that place, the words had been underſtood in a meaning different from that which the court had put upon them. A laſt determination becomes, by virtue of 2 Geo. II. c. 24. part of that ſtatute, and the poſitive law of the place; and the Houſe of Commons is a court, and the only court, competent to explain that law. But if, to ſerve any partial end, the Houſe, in any caſe, were to begin by voting words of the moſt unambiguous ſenſe to be doubtful and equivocal, and then were to explain them in a manner repugnant to their obvious and fair ſignification, ſuch explanatory reſolution ſurely would not, and ought not to be conſidered as final and binding on Committees, in all ſubſequent queſtions relative to that place; which it muſt be, however

however unjuſt and abſurd, if the ſtatute were to be held to attach upon it. *(Vide infra.* Caſe of Cricklade, Note (B.))

P. 20. 24. (D.) For the ſenſe of the expreſſion "ſcot and "lot" in reſolutions of the Houſe of Commons, *vide* the Caſe of Milborne Port, (Note E.] *ſupra*, vol. i. p. 70. and the Caſe of Peterborough, *infra.*

P. 25, (E.) I believe there is no inſtance of an attempt to appeal from a rate to the *county* ſeſſions, when there have been four or more *local* Juſtices. Indeed, from a careful peruſal of the ſtatutes of 43 Eliz. cap. 42, and 17 Geo. III. cap. 38, it ſeems that ſuch an appeal could not be allowed. By § 6. of the former, the appeal againſt a rate is given in general terms, "to "the Juſtices of Peace at their quarter ſeſſions." But § 8. after giving the ſame powers as to county Juſtices to local Juſtices within their particular juriſdiction, enacts, "That no other Juſ-"tices ſhall enter or meddle there." Then comes the ſtatute of Geo. II. which is more explicit, and (by § 4) *extends*, with regard to a variety of caſes and perſons, the right of appeal "to "the next general or quarter ſeſſions of the peace for the county, "riding, diviſion, *corporation*, or *franchiſe*, where ſuch pariſh, "townſhip, or place, (for which the rate has been made) lies." If the act had gone no farther, it never could have been ſuppoſed that the parties, thereby authoriſed to complain of a rate made for a pariſh within a *corporation* or *franchiſe*, could have appealed to the *county* at large; and, if this is true, the ſubſequent *proviſo* (§ 5.) cannot extend farther than the words expreſs, *viz.* to caſes where there are not four local Juſtices.

XXVII.

THE CASE OF THE CITY OF PETERBOROUGH,

In the County of NORTHAMPTON.

On Tueſday, the 21ſt of November, which was the day appointed for chooſing this Committee (1), the Houſe not being complete, they adjourned to the day following.

On Wedneſday, the 22d of November, the Committee was choſen, and conſiſted of the following Gentlemen:

Rt. Hon. Geo. Rice, Chairman,	Members for	Carmarthenſhire.
John Mayor, Eſq;		Abingdon.
Thomas Liſter, Eſq;		Clitheroe.
Sir Adam Ferguſon, Bart.		Airſhire.
William Adam, Eſq;		Gatton.
Abel Smith, Eſq;		Aldbor. Yorkſhire.
Jervoiſe Clarke, Eſq;		Yarm. Hants.
Iſaac Martin Rebow, Eſq;		Colcheſter.
Sir George Howard, K. B.		Stamford.
Charles Brett, Eſq;		Leſtwithiel.
John Durand, Eſq;		Plympton.
John Robinſon, Eſq;		Harwich.
Sir John Hoghton, Bart.		Preſton.
NOMINEES, *Of the Petitioner,*		
John Elwes, Eſq;		Berks.
Of the Sitting Members		
Lord John Cavendiſh,		York.

PETITIONER

James Phipps, Eſq;
Sitting Member.
Matthew Wyldbore, Eſquire.

COUNSEL.

For the Petitioner.
Mr. Mansfield, Mr. Hardinge.
For the Sitting Member.
Mr. Lee. Mr. Graham.

(1) Votes, 31 Oct. 1775. p. 30.

THE

THE

CASE

Of the CITY of

PETERBOROUGH.

ON Thurſday, the 23d of November, the Committee being met, the petition of Mr. Phipps was read, containing a charge of bribery againſt Mr. Wyldbore, the ſitting member petitioned againſt, by himſelf or agents, and of partiality in favour of Mr. Wyldbore, againſt the returning officer; and alleging, that legal votes tendered for the petitioner had been rejected, and the ſuffrages of perſons not entitled to vote received for the ſitting member (1)

Then the laſt determination of the right of election in Peterborough was read, and is as follows:

13 May, 1728. Reſolved, "That the right of electing "citizens to ſerve in Parliament for the city of Peterbo- "rough, in the county of Northampton, is in the inhabi- "tants within the precincts of the Minſter there, being "houſeholders, not receiving alms, and in *other* the inha- "bitants within the ſaid city, paying ſcot and lot (2)."

Then the ſtanding order of Jan. 1735-6 was read (3).

The counſel for the petitioners abandoned the charge of bribery, ſo that the only inquiry before the Committee was, Whether Mr. Wyldbore or Mr. Phipps had the majority of legal votes.

The

(1) Votes, 31 Oct. 1775, p. 27.
(2) Journ. vol. xxi. p. 162. col. 2.
(3) *Supra*, vol. i. p. 51.

The numbers on the poll, as delivered in by the returning officer, were,

For Mr. Wyldbore 219
For Mr. Phipps 212
Majority for Mr. Wyldbore 7

But the counſel for Mr. Phipps propoſed to ſhew,

1ſt, That certain perſons had been admitted to vote for Wyldbore becauſe their names ſtood in the poor-rate made immediately previous to the election, who were fraudulently rated, not being poſſeſſed of rateable property, and who therefore were not entitled to vote.

2dly, That perſons not *bona fide* houſeholders within the precincts of the Minſter, had been received as ſuch, to vote for the ſitting member.

3dly, That to be entitled to vote as an inhabitant within the city, though not within the precincts of the Minſter, it is neceſſary to be a *houſeholder*, and that certain perſons had been admitted on the poll for the ſitting member, who were not houſeholders.

4thly, That ſeveral perſons poſſeſſed of rateable property, and who had applied to be rated, and were refuſed by the pariſh officers, had tendered their votes for the petitioner, and had been rejected; and that their votes ought to be allowed by the Committee.

Before they entered on theſe particular heads, they began by producing evidence to ſhew partiality in the pariſh officers, and fraud and irregularity in making the rate of 16 September, 1774, according to which the poll was taken; and partiality in the Juſtices, on an appeal from the rate to the Quarter-Seſſions for Peterborough.

The facts proved on this head were as follow.

There are at Peterborough three churchwardens and three overſeers of the poor choſen annually, and four corporation Juſtices.

The churchwardens of 1774 were William Elger, Samuel Stevens, and Robert Muggleſtone. They had all ſerved the office before (A)

The overſeers were, Bryan Betham, an *apothecary*, Iſaac Strong, *attorney*, and William Hetherington. They too had ſerved before (A).

Of the four Juſtices, the Dean of Peterborough, and William Strong, brother to Strong the overſeer, and—— Blake, were active friends of Mr. Wyldbore.—The Dean

of

of Peterborough, the two Strongs, Blake, Elger, Muggleſtone, Betham, and Hetherington, convaſſed the town with Wyldbore, in July and September, 1774. (On the firſt canvaſs it was not known that Phipps would be a candidate.) It did not appear that any of the above mentioned perſons ever aſked any votes for Wyldbore. Iſaac Strong was his ſteward, and had paid his rates to the pariſh officers on former occaſions. All the pariſh officers of 1774 were ſubſtantial houſeholders.

The rates are uſually made at Peterborough two or three times a year, according as the money is wanted. The practice had been to make them in open veſtry, where all the pariſhioners who pleaſed might attend, for which purpoſe notice uſed to be given by the pariſh clerk after the evening ſervice on the Sunday previous to the day for making the rate. But in 1768, before the general election, a private rate was made by the then pariſh officers without the uſual notice, or the preſence of the pariſhioners. The expreſſion of one of the witneſſes was, "That this method *originated* on that occaſion." After that time the former method was renewed, and continued till September, 1774, when the rate, according to which the poll at the laſt election was taken, was made privately, in the ſame manner as in 1768. Before the election in 1768 a number of perſons, who had never applied till then, aſſembled, and deſired to be put on the rate. The ſame thing happened in January, 1774, but it did not appear that there was any riot on either of thoſe occaſions. Since the laſt election the rates have continued to be made in private, as thoſe of 1768, and September, 1774. The overſeers took the opinion of counſel in 1774 before they made the private rate, and were adviſed that it would be perfectly legal. It was *allowed* by the Dean of Peterborough, and Mr. Blake.

On the 26th of September, 1774, the following notice of appeal to the Quarter-Seſſions by Armſtead Parker, Eſquire, and Thomas Warriner, two pariſhioners, was ſerved on the pariſh officers.

"To the churchwardens and overſeers of the poor of "the pariſh of St. John Baptiſt, in the city of Peter-"borough, in the Soke of Peterborough, and county "of Northampton, and to all and every of them jointly "and ſeparately.

" Take notice that we whoſe names are hereunto ſub-
" ſcribed, inhabitants of and in the ſaid pariſh of St. John
" Baptiſt, do intend to appeal, at the next General Quar-
" ter-Seſſions of the peace, to be holden in and for the
" ſaid Soke, in Peterborough aforeſaid, concerning our
" being aggrieved by the late rate or aſſeſſment made by
" you, or ſome of you, for the relief of the poor of the
" ſaid pariſh, and allowed by two Juſtices of the peace in
" and for the ſaid Soke. And we do give this further
" notice, that we, finding ourſelves aggrieved by the ſaid
" rate or aſſeſſment, have material objections to *ſeveral*
" *perſons* being left out of the ſame, and to the ſums charg-
" ed on ſeveral perſons therein; and that we find ourſelves
" aggrieved by the neglect of you the ſaid churchwardens
" and overſeers, or ſome of you; and alſo by his majeſty's
" Juſtices of the peace in and for the ſaid Soke, concern-
" ing the making and allowing the ſaid rate or aſſeſſment.
" And we do require you to produce the ſame at the hear-
" ing of the ſaid appeal, and all and every the other rates
" and aſſeſſments, by you, or any of you, made for the
" relief of the poor of the ſaid pariſh; and alſo all and every
" other rates or aſſeſſments at any time or times heretofore
" made for the relief of the poor of the ſaid pariſh, and
" now in your, or any of your cuſtody or power, and all
" the books of entries of meetings for the making orders
" and rates touching and concerning the relief and ordering
" of the poor of the ſaid pariſh. Dated the 26th day of
" September, 1774."

(Signed) Arm. Parker.
Thomas Warriner, s
by P. Deſcow, hi
Attorney.

The appeal came on to be heard at the Quarter-Seſſions on the 5th of October, two days before the election, the four Juſtices attending, and Mr. Blake, one of the two who allowed the rate, being in the chair. An objection was immediately taken by the counſel (1) for the pariſh officers, to the notice of appeal, on the ground that it did not ſpecify the names of the perſons whoſe omiſſion or inſertion

(1) Mr. Graham.

ſertion in the rate were the objects of complaint. This objection was allowed by the juſtices, after hearing counſel on the other ſide, and they diſmiſſed the appeal.

One Edward Laxton, a perſon on the rate, ſaid, that in a converſation he had with Hetherington, the overſeer, about the private rate, upon his ſaying, "We have no voice in "the election, if the pariſh officers make the rate in the "manner they do, and put in and leave out whom they "chooſe;" Hetherington replied, "They *would* do ſo, "and that they would cram the members down their "throats." He ſaid, he did not underſtand this to have been ſaid in a jocular way. On his croſs-examination, it appeared, that the converſation paſſed after the election, and after Mr. Phipps's firſt petition had been preſented in the former ſeſſion of Parliament; that there were two or three perſons preſent who were of both parties; and that he (Laxton) had never heard Hetherington, or any other of the pariſh-officers ſay any thing purporting that they wonld make a partial rate, in order to ſerve the purpoſe of the election, or any particular candidate.

After this general evidence reſpecting the rate of 16 Sept. 1774, the counſel for the petitioner proceeded.

Iſt Head.] Firſt, To produce evidence to ſhew that five perſons, viz. William Bladwyn, William Bowker, John Colls, James Blades, and Thomas Tees, were fraudulently rated for property of which they were not the occupiers, and whoſe votes the Committee ought therefore to ſtrike off the poll.

IId Head.] Secondly, To diſqualify other two voters, *viz.* John Neegers, and Henry Bracken, by ſhewing that they were not *bona fide* houſeholders within the precincts of the Minſter, having voted under that deſcription.

☞ I ſhall have occaſion in the ſequel of the caſe to mention why I have not thought it neceſſary to ſtate the evidence concerning the ſeven voters juſt mentioned.

IIId Head.] When the counſel for the petitioner came, on the third head, to prove that certain perſons who had voted as inhabitants of the city, without the precincts of the Minſter, were not houſeholders, and conſequently, as they contended, not entitled to vote by the laſt determination, the counſel on the other ſide objected to the hearing of evidence on this ſubject.

In conſequence of this objection, the queſtion, whether it is neceſſary that ſuch perſons ſhould be houſeholders, was argued by all the counſel.

COUNSEL for the Petitioner.

According to the rational unprejudiced conſtruction of the words of the laſt determination, the qualification of *being houſeholders* extends to the inhabitants without the precincts of the Minſter, for the word "*other*" ſhould be underſtood to be uſed ſo as to carry on the qualification ſpecified in the firſt member of the ſentence to the ſecond; although, with regard to the claſs of voters mentioned *there*, another is added, *viz.* that they muſt be payers of *ſcot* and *lot*.

If, however, the Committee ſhould think this too violent a conſtruction of the words, it will appear from an attentive conſideration of the ſubject that the deſcription of "*an inhabitant paying ſcot and lot*" neceſſarily implies, that the perſon ſo deſcribed ſhould be a *houſeholder*, and that, where the words "*houſeholder*," or, "*houſekeeper*," are added, it is merely *ex abundanti cautelâ*.

"*Paying ſcot and lot*" is a ſort of corrupt abbreviation of the proper ancient expreſſion which was "*paying ſcot, and* "BEARING *lot*," the term "*bearing*" having been dropt in this, and many other determinations of the Houſe of Commons, as the word "*paying*" is dropt in a Statute of Henry VIII. where the citizens of London are ſaid "*to* BEAR "*ſcot and lot* (1)." "To pay ſcot," therefore, is to pay parochial taxes, and, "to bear lot," to perform parochial duties, and diſcharge parochial offices. One of the moſt obvious of theſe offices is that of an overſeer of the poor, and a man who cannot ſerve as overſeer, cannot be conſidered as one bearing lot in his pariſh. Now by the ſtatute of Elizabeth (2), none but houſeholders can be overſeers. Indeed, it may be ſaid, that this was a new office created by the ſtatute; but it is more probably the ſame with that of the ancient collectors, to whom new powers were given, the words of the ſtatute requiring them to be houſeholders being only declaratory. If that were not ſo, ſtill, as all the reſolutions and determinations of the Houſe

(1) 33 Hen. VIII. cap. 9. § 2.
(2) 48 Eliz. cap. 2. § 1.

Houſe of Commons mentioning "*ſcot and lot*" are poſterior to the reign of Queen Elizabeth, the Houſe muſt be preſumed to have known, that to be an overſeer of the poor, which ſince the ſtatute is a parochial office and duty, and therefore comprehended in the idea of "*bearing lot*," it is neceſſary that the party ſhould be a houſeholder.

It will be found, by ſeveral caſes in the Journals, that when the Houſe ſpeaks of inhabitants paying *ſcot and lot*, they mean *houſeholders*, whether that word be added to the deſcription or not.

In the caſe of Honiton, 3 Feb. 1710-11, where there was a double return, the Committee of elections reported as follows:

"If the right of election be in the inhabitant *houſe-*
"*holders*, paying ſcot and lot, Mr. Shephard is returned
"duly elected.

"If the right be as well in the populace, as in the in-
"habitants paying ſcot and lot, Sir Walter Yonge is re-
"turned duly elected (1)."

Here, in the firſt propoſition, the word "houſeholders," *ex abundanti cautelâ*, is added; but, in the ſecond, when the Committee is unqueſtionably ſpeaking preciſely of the ſame claſs of men, it is dropt, and is diſcontinued through the reſt of the report, and likewiſe in the reſolution of the Committee on the right of election, which they thought extended to the potwallers not receiving alms, (a deſcription uſed in this caſe as equivalent to *populace* (2)) as well as to inhabitants paying ſcot and lot (3). The Houſe thought proper to amend the reſolution, by leaving out the words which declared a joint right to be in potwallers not receiving alms, and reſolved,

"That the right of electing members to ſerve in Parlia-
"ment for the borough of Honiton, in the county of
"Devon is in the inhabitants of the ſaid borough, paying
"ſcot and lot only (4)."

They adopted, therefore, the firſt propoſition ſtated to them by the Committee, and muſt have meant to declare the right of voting to be in the perſons deſcribed in that propoſition

(1) Journ. vol. xvi. p. 479. col. 2.
(2) *Vide ſupra*, Caſe of Seaford, p. 27. Note (B).
(3) Journ. *loc cit.* p. 480. col. 1.
(4) Journ. vol. xvi. p. 480. col. 1.

propoſition, and not in a ſet of men concerning whom there was nothing laid before the Houſe, *viz.* inhabitants, paying ſcot and lot, not houſeholders.

In the caſe of Tamworth in 1798-9, the Houſe came to the following reſolution t

17 March, 1698-9. Reſolved, "That the right of "election of burgeſſes to ſerve in Parliament for the "borough of Tamworth, is in the inhabitants paying "ſcot and lot, and in ſuch perſons as have freeholds with-"in the ſaid borough, whether reſident in the ſaid borough "or not (1)."

In the caſe of the ſame borough in 1722-3, one of the parties contended, "That the right of election was in the "inhabitants paying ſcot and lot, and not receiving alms."

The other inſiſted, "That it was in the inhabitants pay-"ing ſcot and lot, and in ſuch freeholders who have free-"holds in the borough, whether reſident in the borough "or not;" agreeably to the former determination.

It appears, by this ſtate of the queſtion between the parties, and by the evidence as ſet forth in the report entered in the Journals, that the right of the inhabitants paying ſcot and lot was not conteſted, and that the only matter in iſſue was the right of the freeholders (2). The Committee (3), and the Houſe (4), came to the following reſolution:

23 Jan. 1722-3. Reſolved, "That the right of election "of burgeſſes to ſerve in Parliament for the borough of "Tamworth, is in the inhabitants *being houſeholders*, "paying ſcot and lot, and not receiving alms."

Here the word "*houſeholders*," is employed merely in the way of explanation. The Houſe muſt have held, that the qualification of being a houſeholder was neceſſarily involved in the idea of an inhabitant paying ſcot and lot; for, as there was no evidence produced relative to the firſt claſs of voters, the words declaring their right in this reſolution of 1722-3, muſt be conſidered as exactly equivalent in their import to thoſe of the reſolution of 1698-9, and to thoſe made uſe of by both parties in 1772-3, in ſtating what they

(1) Journ. vol. xii. p. 598. col. 2.
(2) Journ. vol. xx. p. 100. col. 2. (3) *Ibid.*
(4) *Ibid.* vol. p. 102. col. 1.

they contended to be the right of election; and in neither of thoſe inſtances is the word "*houſeholders*" expreſſed.

The difference between the caſes of Honiton and Tamworth is this: In the firſt, the word "*houſeholders*," having been employed in ſtating the right of election in the Committee, it was omitted in the determination. In the ſecond, it was left to be underſtood, in the ſtate of the queſtion between the parties, and was ſupplied, in the determination (B).

Indeed the word "*inhabitants*" ſtanding alone, (although in ſome inſtances it may admit of a more general interpretation) where expediency and good ſenſe require the excluſion of ſervants, lodgers, or inmates, ought perhaps to be confined to houſeholders. In common language, when we talk of the inhabitants of a pariſh, who are meant but thoſe who are permanent houſeholders there? Thus Lord Coke, in his Commentary on the ſtatute of 22 Hen. VIII. cap. 5. concerning the reparation of bridges in highways, expounds "*inhabitants*," (no qualifying epithet being ſuperadded) to mean "ſuch as be houſeholders (1)."

If, after all, the ſenſe of the reſolution ſhould appear doubtful to the Committee, the uſage of the place, if evidence is produced to ſhow the uſage, will ſatisfy them, that it has always been underſtood at Peterborough, that none but houſeholders can vote, whether living within, or out of, the precincts of the Minſter.—The laſt determination of the right of election in Great Marlow, is as follows:

21 Nov. 1699. Reſolved, "That in the borough of "Great Marlow, in the county of Bucks, thoſe inhabi- "tants only who *pay ſcot and lot*, have a right to give "voices in the election of burgeſſes to ſerve in Parliament "for the ſaid borough (2)."

Now ſuppoſing the abſtract ſenſe of the words to be doubtful, yet, as it is well known, to thoſe who are acquainted with that borough, that the uniform uſage has been for none but houſeholders to vote (3), a Committee, on hearing evidence of the uſage, would certainly interpret the determination to extend only to houſeholders.

That

(1) 2 Inſt. p. 703.
(2) Journ. vol. x. p. 478. col. 1.
(3) *Quære.*

That evidence of uſage is to be admitted to explain the meaning of ambiguous expreſſions in laſt determinations is not to be queſtioned, as it is a practice founded in a known rule of law, and eſtabliſhed by various precedents of the laſt ſeſſion, *viz.* in the Caſes of New Radnor, Dorcheſter, &c.

COUNSEL for the ſitting member.

If the Committee ſhould go into the uſage, it would appear that there has been but one conteſted election for Peterborough ſince the laſt determination was made, *viz.* in 1768, and that, upon that occaſion, perſons voted who were not houſeholders.

But the ſenſe of the words is plain and unequivocal, and, in ſuch caſes, it would be highly inconvenient and dangerous to ſuffer parties, under a pretence of uſage, to explain away the obvious import of a laſt determination. It is contrary to grammatical conſtruction to carry the words "*being houſeholders*," forward to the ſecond member of the ſentence. The meaning of the Houſe was to fix a criterion of the ſubſtance and independency of the inhabitants both within, and out of, the precincts of the Minſter. Within thoſe precincts, there is no pariſh-rate; and therefore, as to that part of the city, the qualification of "being houſeholders" was adopted. In the reſt of the city, where the pariſh taxes are paid, the common qualification of paying ſcot and lot was all that was required.

But it is contended, that the deſcription of inhabitants paying ſcot and lot, neceſſarily comprehends the circumſtance of "being houſeholders," whether expreſſed or not. Recourſe is had to the phraſe of "*bearing lot*," and an inference is drawn from it, which would prove that no one can vote in a ſcot and lot borough who is not qualified to be an overſeer of the poor. This would exclude Juſtices of the Peace, and ſeveral other claſſes of men exempted by law from ſerving that office, but whoſe right to vote as ſcot and lot men has never been called in queſtion (C).

Caſes have been cited to ſhew that, in reſolutions of the Houſe of Commons, by "inhabitants paying ſcot and lot," houſeholders are meant, whether the word "houſeholders" be expreſſed or not. But what do thoſe caſes prove? Only inaccuracy in the reports of Committees of elections, and a diſſonance

diſſonance between them, and the determinations of the Houſe conſequent upon them. It is impoſſible to produce an inſtance where, after there has been a determination of the Houſe, declaring the right of election to be in inhabitants paying ſcot and lot, the *Houſe* has held that, to come within that deſcription, the voters muſt be houſeholders. There are numerous inſtances to the contrary. In the caſe of Stamford, in 1735-6, the line is diſtinctly drawn. One of the partes contended,

"That the right of election is in the *houſeholders*, in-
"habitants within the borough, paying ſcot and lot there,
"and not receiving alms or public charities."

The other,

"That the right of election is in the inhabitants pay-
"ing ſcot and lot, and not receiving alms or public
"charity." (1)

And the Committee, and the Houſe, upon evidence that perſons having paid to the poor's rate had always voted, though not houſeholders (2), 8 March, 1735-6, Reſolved,

"That the right of election of burgeſſes to ſerve in
"Parliament for the borough of Stamford, in the county
"of Lincoln, is in *the inhabitants paying ſcot and lot*, and
"not receiving alms or public charities (B)

The paſſage in Lord Coke's ſecond Inſtitute, when taken altogether, is directly againſt the conſtruction for which it was cited, for although he ſays that, for the purpoſes of the ſtatute of 22 Hen. VIII. the inhabitants there meant muſt be houſeholders, he clearly holds, that the word, in its common legal ſenſe, does not admit of that reſtriction. "*Ex vi termini*," ſays he, "every perſon
"that dwelleth in any ſhire, riding, city, or towne cor-
"porate, though he hath but a perſonall reſidence, yet is
"he ſaid in law, to be an inhabitant or a dweller there as
"ſervants, &c. But this ſtatute extendeth not to them,
"but to ſuch as be houſeholders. And this is gathered by
"the words of the fourth branch of this act that giveth
"the diſtreſſe (3)." Therefore, to confine the ſenſe, ſubſequent reſtraining words were neceſſary,

Agreeable

(1) Journ. vol. xxii. p. 615. col. 1.
(2) *Ibid.* p. 616. col. 2.
(3) 2 Inſt. *loc. cit.*

Agreeable to this explanation of the word, is what we find in Gateward's caſe, in Coke's Reports; for there it is ſaid, on a queſtion, whether the inhabitants of the town of Stixwold could be entitled by cuſtom to a right of common in reſpect of their inhabitancy, "What eſtate ſhall he "have who is inhabitant in the common, when it appears "he has *no eſtate or intereſt in the houſe*, (but a mere "habitation or dwelling) in reſpect of which he ought to "have his common? For none can have intereſt in com-"mon in reſpect of a houſe in which he hath no intereſt "(1):" and afterwards, in the ſame caſe, In theſe words, "*inhabitants and reſident*" are included tenant in fee-ſimple, "tenant for life, for years, tenant by *elegit*, &c. tenant at "will, &c. (and tenancy at will is the loweſt intereſt a "*houſeholder* can have in a houſe) and he who hath no in-"tereſt, but only his habitancy or dwelling (2)."

Having finiſhed their arguments on this head, the counſel were directed to withdraw, and being called in again, after the Committee had deliberated for a conſiderable time, the Chairman ſaid he was directed to inform them of the following reſolution:

"The Committee are of opinion, that the word "houſeholders," in the reſolution of the Houſe of Com-"mons, of 13 May, 1728, relates to the inhabitants "within the precincts of the Minſter only, and not to "other the inhabitants within the ſaid city, paying ſcot "and lot."

It was obſerved by the counſel for the petitioner, that the words of this reſolution did not expreſsly exclude them from going into evidence, to ſhow from uſage, that the claſs of voters deſcribed by the words "other the in-"habitants within the ſaid city paying ſcot and lot," muſt be houſeholders; upon which the Chairman ſaid, that the Committee had not mentioned any thing to that purpoſe in their reſolution, but that they had fully conſidered the queſtion, and that, if denied by the counſel, they would come to a ſpecial reſolution upon it (B).

But this was not inſiſted upon.

IVth Head.] The counſel for the petitioner now proceeded to the 4th head: but, having called a witneſs to prove

(1) 6 Co. Rep. f. 60.
(2) *Ibid.*

prove the rateable property of one Thomas Felton, it was inſiſted, on the part of the ſitting member, that the Committee could not receive any evidence on that ſubject, unleſs criminal partiality and miſconduct were firſt proved in the pariſh officers relative to the making of the rate.

They argued as follows:

The rule, that miſconduct or criminal partiality muſt be proved, before the Committee will think themſelves entitled to inquire into the circumſtances of perſons put on or left out, was laid down in the caſe of St. Ives, upon legal grounds, ſtated in the printed report of that caſe. Where miſconduct and partiality are firſt proved, juſtice requires that the rateability of the voters, or perſons who tendered their votes, ſhall be conſidered in the Committee. Perhaps it ought to be ſo, even without a previous proof of miſconduct, if the petition has come on to be tried before there has been an opportunity of purſuing the regular redreſs chalked out by law, againſt unfair and partial rates, by an appeal to the quarter ſeſſions. Has miſbehaviour or partiality been proved in the preſent caſe? Or, before this trial came on, has there not been ſufficient opportunity to impeach the rate at the quarter ſeſſions?

As to the conduct of the pariſh-officers, the evidence produced ſeems intended as the ground of two heads of accuſation. 1. That the overſeers and churchwardens were perſons who might have excuſed themſelves from ſerving in their offices (A). 2. That they did not make the rate in open veſtry, agreeably to the uſual practice. The firſt circumſtance, however, cannot afford a preſumption of criminality, unleſs it had appeared that they were appointed at the inſtigation of Mr. Wyldbore, or took their offices upon them and made the rate, with a view to influence the election. But of this there is not the ſmalleſt evidence. Indeed, every ſuſpicion of that ſort muſt fall to the ground, when it is conſidered that, at the time of their appointment, and even when the rate complained of was made, the diſſolution of the Parliament, which afterwards took place, could not be foreſeen. If the Parliament had ſubſiſted till the expiration of the ſeven years, there muſt have been

been a new appointment of pariſh-officers, and another rate, before the election.

To the ſecond objection it is a ſufficient anſwer that, by law, the pariſh-officers have a right to make a rate in private, to which the concurrence of the pariſhioners is not at all neceſſary; as it is to the making a church-rate. Indeed, in this reſpect, they were ſo cautious, on occaſion of the rate now complained of, that when they found it expedient (on account of the confuſion and diſturbance apprehended, near the time when the general election approached, if the rate ſhould be made in open veſtry) to take the ſame ſtep which had been neceſſary in 1768, they would not reſolve upon it till they were authorized by the opinion of counſel (D). But, as a private rate is perfectly legal, ſo it is proved to be attended with no inconvenience at Peterborough, for all the rates ſince the general election have been made in the ſame manner, without any complaint having been lodged on that account. (This was proved by the witneſſes.)

It will be ſaid, that the pariſh officers and Juſtices were friends to Wyldbore. This is not denied. As electors they had a right to take part with one candidate in preference to another; but no act of agency has been proved on any of them, not even that, when they accompanied him on his canvaſs, they ever ſolicited a ſingle vote. The converſation which Laxton has ſworn to, with Hetherington, happened after the election, and when the petition had been preſented; and if what he then ſaid had any ſerious meaning, it muſt have been, that he thought the ſitting member had ſo good a cauſe, that, however diſagreeable it might be to thoſe who were in a different intereſt, the deciſion of the Committee, which ſhould be appointed to try the cauſe, muſt be in his favour. It is impoſſible to conceive, that, in a company of perſons of both parties, he could have meant to avow that he had concurred in procuring an election contrary to the ſenſe of the borough, by garbling the rate.

It will be ſaid, that the Juſtices, at the quarter-ſeſſions, acted partially in diſmiſſing the appeal; but they did not diſmiſs it till after the objection had been taken, and ſolemnly argued by counſel on both ſides. They diſmiſſed it on the juſteſt grounds, becauſe, as there was no notice of the particular perſons whoſe omiſſion from the rate

rate was objected to, it was impoſſible that the pariſh officers ſhould come prepared to make their defence. Beſides, what they did was authoriſed by a deciſion of the court of King's-Bench, in the caſe of the King againſt the Inhabitants of St. Helen's in Abingdon (1), which was cited by the counſel for the pariſh officers (E). But if the appellants thought there was any ground for their complaint, why did they not appeal again to the following quarter-ſeſſions? and why have they never appealed againſt any of the two ſubſequent rates, which have been in every reſpect the ſame with the rate of September, 1774? (This was not denied.)

It will be ſaid, the appeal was to no purpoſe, being, in effect, *ab eodem ab eundem*. But are we to *preſume* that thoſe whom the law has appointed to judge in ſuch caſes will act with partiality; or that, becauſe ſome of them allowed the rate, they will not judge of the merits of it according to the evidence laid before them at the Seſſions (F)?

If Juſtices do act criminally, is not the court of King's-Bench open to the perſons injured, who may apply for an information againſt them? Was not an application for that remedy within the power of the appellants in 1774, if they had believed that the diſmiſſion of their appeal amounted to miſbehaviour and guilt in the court of quarter-ſeſſions?

As, therefore, the regular mode of relief was open; as there has been time to purſue it, and it has not been done; and as there is no proof of criminality and miſconduct in making the rate, the Committee will not take upon themſelves the character of pariſh officers, but agreeably to the deciſion in the caſe of St. Ive's, will refuſe to hear evidence of the rateability of Felton, and the other perſons whom the counſel for the petitioner propoſe to qualify as having been entitled to be upon the rate at the time of the election.

COUNSEL for the petitioner.

The preſent caſe differs from that of St. Ives. There, the perſons claiming to be put on the poll, had not been rated

(1) Hil. 27 Geo. II. Bott's Poor's Laws, p. 57, 5°.

rated for ſeveral years, and had never before made any complaint on that account; whereas here it will be ſhewn, that Felton and others, omitted in the rate of September, 1774, were on thoſe immediately preceding, and that their circumſtances had not undergone any change to juſtify their being left out on that occaſion.

The poſition contained in the reſolution concerning St. Ives, as it is reported in the printed book (though by the bye, not accurately in the words in which it was delivered by the Chairman (G)) may perhaps be right. But if it can be ſhewn that perſons poſſeſſed of rateable property, for which they had been aſſeſſed in the former rates, were left out immediately before an election, is not this evidence of miſconduct in thoſe who made the rate? Is not what has been already proved reſpecting the pariſh officers, ſuch evidence of partiality and miſconduct as ſhould induce the Committee to think themſelves obliged to go into the merits of the rate? If the doctrine of the caſe of St. Ives is underſtood to be, That the rate is not to be gone into, unleſs ſuch evidence is firſt laid before the Committee, as the court of King's-Bench would require, before they would grant an information, it is falſe, and unſupported by principles, either of law or juſtice.

The circumſtance of the pariſh officers having been volunteers, who took upon them, unneceſſarily (A), a duty which is generally thought burthenſome, certainly furniſhes a preſumption that they did ſo to ſerve election purpoſes. This preſumption gains ſtrength when it is conſidered that, on the canvas, they appeared as the avowed partizans of Mr. Wyldbore. It was ſaid, that, as the diſſolution of the Parliament was not known when they were appointed, nor when they made the rate, there could be no view in their appointment, and in the rate, to the election. But it will be obſerved, that if the laſt Parliament had died a natural death, the general election muſt have come on ſome time in 1775, and the rate complained of was made near the end of the year preceding.

Can any thing afford a ſtronger ground for preſuming fraud and occaſionality in making the rate, than the innovation of not holding a veſtry for that purpoſe, which, as one of the witneſſes ſwore, *originated* in 1768, and was laid aſide from that year till 1774; becauſe in this interval of time there

there were no election purpoſes to ſerve. There is, perhaps, no expreſs proviſion in any ſtatute againſt rates made without the concurrence or privity of the pariſh, but the preamble to the 17 Geo. III. cap. 3. ſhews that ſuch private rates are highly diſapproved of by the legiſlature, and even conſidered as contrary to the true intent and meaning of the 43d of Elizabeth. The words are, "Whereas great inconveniences do often ariſe in cities, towns corporate, pariſhes, townſhips, and places, by reaſon of the unlimited power of the churchwardens and overſeers of the poor, who frequently, on frivolous pretences, and for private ends, make unjuſt and illegal rates, *in a private and clandeſtine manner*, contrary to the true intent and meaning of a ſtatute made in the 43d year of the reign of Queen Elizabeth, intituled, "An Act for the better relief of the poor." Are not theſe words declaratory of the ſpirit of the ſtatute of Elizabeth, and a proof that private rates are contrary to the intention of the legiſlature (D)? Is a rate of that ſort, made on the eve of an election, in a place where the conſtant practice has been to hold a veſtry for that purpoſe, and by officers the avowed adherents of one of the candidates, is ſuch a rate to be conſidered by the Committee as fair, and unimpeachable? Is it ſo binding as to preclude the Committee from inquiring into the rateability of perſons who voted, or claimed to vote? The rate, when fair and unimpeached, may be a true and ſufficient meaſure of the rateability. Where there has been reaſon to ſuſpect it as garbled and fraudulent, the Houſe, and the committee of elections, have, upon former occaſions, conſidered it no longer as a criterion. They have examined into the rateability of the claimants, and when found to be poſſeſſed of rateable property, have allowed their votes. In the caſe of Newark, the right of the Houſe to inquire into the rateability of ſcot and lot voters, was ſo far from being queſtioned, that it is expreſsly recognized in the laſt determination of the right of election.

11 Jan. 1699-1700. Reſolved, "That the mayor, aldermen, and all the inhabitants within the borough of Newark upon Trent, in the county of Nottingham, who pay or *ought to pay*, ſcot and lot, within the ſaid borough have a right to vote at the election of members to ſerve in parliament for the ſaid borough (1)."

In

(1) Journ. vol. xiii. p. 111. col. 2.

In like manuer, in the caſe of Milborne Port, which happened laſt year, the Committee went largely into the rateability of the different voters; becauſe there had been great irregularity in the appointment of the overſeers. Nay, *this* very Committee has allowed the petitioner to queſtion the rateability of perſons *on* the rate. If faults of *commiſſion* in the rate are cognizable here, there can be no reaſon why faults of *omiſſion* ſhould not be ſo likewiſe.

But we are told, that the proper diſtinction for trying the rate, was the quarter ſeſſions; That, though the firſt appeal was quaſhed for a defect in the form of the notice, a new one might have been brought to the next ſeſſions, or that the two ſubſequent rates might have been appealed againſt: That if, on the trial of any of thoſe appeals, the magiſtrates had refuſed to do juſtice, they might have been proceeded againſt in the court of King's Bench; That, as none of theſe ſteps have been taken, the parties are concluded, and are to be conſidered virtually to have acquieſced in, and ſubmitted to, the rate. But, will the Committee adopt this reaſoning? To what purpoſe was it to appeal to judges known to be intereſted in confirming the rate (F)? The objection taken to the notice, was an excellent expedient to ſave them from the ſhame of deciding againſt the merits, for ſurely they could not believe, that the officers were really ignorant who were the objects of the appeal. If the juſtices were in truth of opinion, that the notice was not ſufficient, it was their duty to adjourn the appeal, and thereby give time to ſet right the miſtake; for the ſtatute of 17 Geo. II. cap. 58, enacts, "That if it ſhall appear to "the Juſtices, that *reaſonable notice* was not given, then "they ſhall adjourn the appeal to the next quarter ſeſſi-"ons (1)."

But ſay they, Why not appeal to the court of quarter ſeſſions, held next after that which diſmiſſed the firſt appeal? The anſwer is this; It is very doubtful whether that was in their power. An appeal under the ſtatute laſt mentioned, muſt clearly be to the ſeſſions next immediately after the making the rate, and if an appeal againſt a rate might, by the ſtatute of 43 Eliz. have been made generally to any ſeſſions, the 4th ſection of 17 Geo. II. cap. 38. which was meant to correct and explain the forme. enactment on this ſubject, ſeems alſo to limit the time within which *every* appeal

(1) § 4.

peal from a rate muſt be brought. This is the more probable, becauſe, in other caſes of appeals, under the poor-laws, *viz.* from orders of removal, the ſame limitation is eſtabliſhed (1). But the parties well knew, that an appeal to the Juſtices of Peterborough, was to no purpoſe. They knew that if they had ſued for, and obtained, an information againſt them, in the court of King's Bench, the ſpecific relief which they required, could not have been obtained there. That court could not have granted a *mandamus* for putting thoſe on the rate, who had been left off. They reſerved their complaint, therefore, for this tribunal, knowing that every preliminary or collateral queſtion neceſſary to lead to a deciſion of the merits of the election, is within the juriſdiction of the Committee, though there ſhould be other judicatures for the direct trial of ſuch queſtions. This rule was recognized in the caſe of North Berwick. An argument uſed on that occaſion will apply here. By the ſtatute of 16 Geo. II. cap. 11. § 24. none but magiſtrates and counſellors, or conſtituent members of any meeting for, or previous to, the election of magiſtrates or counſellors for a royal borough in Scotland, are empowered to complain to the Court of Seſſion, of any wrong done at ſuch election. The magiſtrates and counſellors elect the delegate, and the delegates for each diſtrict elect the member. It was, therefore, contended, that the Committee were particularly bound to entertain the complaint of the candidate, or of the conſtituent members of the other boroughs of the diſtrict, concerning the election of the magiſtrates of Jedburgh, who had choſen the delegate for that place. It was ſaid, they were materially intereſted, yet could not be heard in the inferior court. For the ſame reaſon, the Committee here ought to entertain Mr. Phipps's complaint of an unfair rate, for *he* could not have gone to the ſeſſions, as a perſon aggrieved by the leaving out of men who ſhould have been on the rate; eſpecially as the firſt ſeſſions immediately after the rate (to which alone, perhaps, the appeal could have been brought) happened before the election. They ought to hear his objections, as complaining in the name of the perſons left out of the rate; ſince it

(1) 3 William and Mary, cap. 11. § 10.

would ſeem, that even *they* could not have complained to the ſeſſions. They were thereby delivered from a burthen, and therefore could not appeal for relief as perſons aggrieved. Indeed, it is eaſy to ſee, that caſes may frequently ariſe, where, by a partial rate, perſons may be greatly injured *as electors*, and yet cannot be ſaid to be aggrieved, conſidered merely with a view to the payment of the poor-tax; which, however, is the proper, perhaps the only object of the juriſdiction of the ſeſſions, on an appeal from a rate. Thus, if perſons are put on who ought not to be rated, and they are ſatisfied; others, who are alſo in the rate, cannot ſay they are aggrieved, becauſe the ſame burthen is ſhared with a greater number of people; and, in the caſe juſt put, if thoſe on the rate do not complain for being charged alone, with what ought to be divided among them and thoſe left out, the latter cannot ſay they are injured. But they may ſay, at *the election*, the merits of which, it is the peculiar province of the Committee to determine, that they have been injured by being left unrated, with a view to rob them of the franchiſe of voting. So may thoſe entitled to be on the rate, and to vote, ſay they are injured, if others, not entitled to be rated, are put on in order to give them votes, and to overwhelm, by their means, the ſuffrages of the legal electors.

Upon the whole——It is clear, from principle and authority, that rateability may be enquired into in the Committee: That, though a fair rate may be a true and ſufficient meaſure of rateability, and to be rated, when the rate is liable to no ſuſpicion, a ſatisfactory criterion of the right to vote in ſcot and lot boroughs; yet, when there is reaſon to ſuſpect the rate, the more troubleſome but more certain ſtandard of rateability ſhould be reſorted to: And that, although there is another juriſdiction for examinieg the juſtice and validity of rates, yet the Committees of elections, ſo far from being thereby precluded from going into the ſame enquiry, are bound to enter upon it in a variety of caſes. The preſent caſe particularly calls on the Committee to take ſuch an enquiry upon them; for, the conduct of the returning officers muſt render the rate ſuſpicious, and the conduct of the Juſtices muſt ſhow, that a new appeal to them would have been fruitleſs and vain.

When the circumſtances of Felton's property are laid before the Committee, they will ſee ſtill greater reaſon to reject

ject the rate of September, 1774, and to decide merely according to the rateability of the perſons who, by the partiality of the pariſh officers, were denied the benefit of that uſual evidence of their right to vote.

COUNSEL for the ſitting member, in reply.

The caſe of Milborne Port differs widely from this. There, each party had appointed a ſett of overſeers, and each ſett made a different rate. To decide between them, it was abſolutely neceſſary that the rateability ſhould be taken into the account. Still, however, the Committee required that the voters ſhould be perſons who had been rated *de facto*.

In the caſe of Newark, the right of election, as declared by the reſolution, is exactly what both parties admitted to be preſcribed by the charter of Car. II. making Newark a parliamentaryborough. Can *that* have any influence with regard to other boroughs? Where is the reſolution which ſays, that in general in ſcot and lot boroughs, perſons rateable, whether rated or not, ſhall have a right to vote? Such is the doctrine which the counſel for the petitioner wiſh to eſtabliſh.

Part of their argument goes to prove that it is not neceſſary to ſhow miſconduct. But is not the caſe of St. Ives in point to the contrary? Does not the caſe of the King and the pariſh officers of Weobly ſhow that the court of King's Bench thought the ſeſſions the only juriſdiction for trying the rateability of perſons rated or not rated?

They tell us next, that they have proved miſconduct. How?——*Becauſe the pariſh officers were friends to Mr. Wyldbore.*——Can that be charged as a crime on men entitled to vote in the choice of their repreſentatives?——*Becauſe the rate was not made in the veſtry, according to the uſage before* 1768.——But in truth this uſage was an uſurpation attended, or liable to be attended, with great inconvenience, and therefore wiſely laid aſide. The veſtry is a mere eccleſiaſtical meeting, which exiſted previous to the ſtatute of Queen Elizabeth. The proviſions of that ſtatute take no notice of it, and the acts to be done in conſequence of thoſe proviſions have nothing to do with it. The preamble

amble to the ſtatute of 17 Geo. II. cap. 3. where it complains of private clandeſtine rates, means rates which were not made known to the pariſh after they had been aſſeſſed. What is the remedy provided? Not that they ſhall be made in the veſtry, but that, *after they are made and allowed*, they ſhall be pnbliſhed in the church, and open to the inſpection of every inhabitant (1) (D).——*The appeal was diſmiſſed when it ought to have been adjourned.*——But who ever heard of adjourning an appeal from a rate when the notice of appeal was illegal. By the *reaſonable notice*, the neglect of which atuthorizes the Juſtices to adjourn an appeal, it has always been underſtood, that the legiſlature meant notice for a *reaſonable time* before the hearing.——*Two of the Juſtices who diſmiſſed the appeal, were the two who allowed the rate.*——But were they not entitled by law to ſit on the hearing of the appeal? Is not the allowance of the rate a mere miniſterial act, which the Juſtices muſt do without examination? This cannot diſqualify them from taking part, in their judicial capacity at the ſeſſions, in an enquiry into the merits and juſtice of the rate. Appeals from rates are not like thoſe from orders of removal, where the two Juſtices who make the order act judicially (F).—In ſuch caſes it has been determined, that where there are corporation Juſtices, if an order of removal is made by two of them, the appeal muſt be to the county ſeſſions (2).

It is contended, that, after the firſt appeal had failed, another would not have lain to the ſubſequent ſeſſions. But the law hitherto has been underſtood to be, that ſuch an appeal would have lain. The ſtatute of 43 Eliz. leaves the appeal at large. That of 17 Geo. II. limits it, in the caſes there provided for, to the next ſeſſions. "But," ſays Dr. Burn, "both may ſeem to ſtand well together, and then "the ſenſe of the ſtatute of the 13 of Geo. II. will be "this, That the appeal againſt any thing done or omitted "by the overſeers or Juſtices, in caſes where no appeal is "given by former ſtatutes, muſt be the next ſeſſion only; "becauſe the clauſe which gives the appeal, limits it to "ſuch next ſeſſions; but in caſes wherein an appeal is given "by former ſtatutes, ſuch appeal may be to the next ſeſſi-"ons

(1) § 1, 2, 3.

(2) The King *v.* Malden. Burn, New Ed. v. iii. p. 490. Bott. 217. pl. 421. Eaſt Donyland and St. Giles's Colcheſter. Bott. *ibid.* Burn. *ibid.* 491. *from* Burr. Settl. Caſes, p. 592.

" ons according to this clauſe, or may be according to the " directions of ſuch former ſtatutes (1)." Agreeably to this conſtruction, which till now has never been controverted, the parties who brought the firſt appeal in the preſent inſtance, being perſons having a clear right to appear under the ſtatute of Elizabeth, might have lodged a new appeal at the ſubſequent ſeſſions; for the firſt having been diſmiſſed for want of notice, and without a hearing, it was to be conſidered as if it had never exiſted.

When it is aſked, why the parties have not appealed from either of the rates made ſince the election, recourſe is ſtill had to the pretended partiality of the Juſtices; but does not their ſubmiſſion rather ſhow that they were conſcious that the merits of the former appeal were againſt them?

The point in the caſe of North Berwick, which has been relied on, was very unlike the preſent queſtion. The petitioners in that cauſe were perſons who could not have had redreſs in the court below. Beſides, a complaint which had been lodged in that court, by perſons competent in law to complain, remained in ſuſpenſe, and undecided, when the trial of the petition came on. But, in the preſent caſe, every one of the electors was empowered, under the ſtatute of 17 Geo. II. cap. 38. to litigate the rate at the ſeſſions. The right of appeal is not confined, as has been argued on the other ſide, to perſons on the rate. It is extended to *every perſon* who ſhall have any material objection to any perſon or perſons being put on, or left out (2). If, by a proceding analogous to what was done in the caſe of North Berwick, a complaint had been lodged at the quarter ſeſſions, but had not come on to be heard before the trial of the petition, this Committee might, perhaps, have thought themſelves obliged to enquire into the grounds of the complaint. Where there is a charge of criminality in making the rate, which there has not been time to try in the ordinary judicature, the rate, in ſuch caſe, muſt be of doubtful authority, and rateability will be reſorted to. Where criminality is proved before the Committee, rateability, for the ſame reaſon, muſt be the criterion. But here there has been time to purſue the ordinary courſe, and it has not been purſued. Criminality has been alledged, but

(1) Burn, vol. iii. p. 303.
(2) § 4.

but has not been proved. Under theſe circumſtances the Committee will ſurely think themſelves precluded from going into any enquiry concerning the rateability of Felton and the others.

After the arguments were cloſed, the counſel, by the deſire of the Committee, ſettled and agreed on the following ſtate of the queſtion, " Shall the parties be permitted *now* " to go into evidence to prove that Thomas Felton " ought to have been admitted upon the rate in Septem- " ber, 1774?"

The Court being cleared, the Committee deliberated for a conſiderable time, and then the counſel were called in, and the Chairman ſaid, he was directed to inform them,

That the queſtion had been reſolved in the negative.

But that the Committee had alſo come to the following reſolution.

Reſolved, " That the counſel for the petitioner be per- " mitted to proceed to offer any evidence they think " proper, to prove any miſconduct relative to that rate."

The counſel for the petitioner ſtill contended that they had laid a ground of miſconduct, and ſaid they were ready to prove that Felton had been rated immediately before, and was left out of the rate of 16th September, 1734. That this would be *prima facie* evidence of partiality and miſconduct in thoſe who made the rate of September, 1774. They ſaid, they only meant to offer this in proof, as an additional circumſtance to be thrown in the ſcale with the former evidence of miſconduct, and therefore were not precluded, by what the Committee had juſt reſolved, from calling witneſſes for that purpoſe.

They were told by the Chairman, That they might offer what evidence they pleaſed, with a view to miſconduct.

Upon this they called Laxton to prove that Felton (1) had been formerly rated, and was left out in September 1774, and that his circumſtances were the ſame when left out of the rate, as formerly when he had been rated.

The counſel for the ſitting member inſiſted, that this was contrary to the reſolution of the Committee.

Any

(1) The rates themſelves would have proved this, and indeed were the proper evidence of it.

Any proof that a man had been formerly rated, and was left out in the new rate, could not, they ſaid, be received as evidence of miſconduct, ſince a man's circumſtances may have changed in the interval between the two rates, and the pariſh officers are bound to act according to the ſituation of the perſons rated at the time of making each particular rate, and to vary the rate as their circumſtances change (1).—And they contended, that to bring evidence of what Felton's circumſtances were at the time when he was left out, was, in fact, to bring evidence to prove that he ought to have been put upon the rate, and therefore, according to the reſolution of the Committee, was not *now* admiſſible.

The court was cleared again; the Committee deliberated; and the counſel being called in, the Chairman informed them after reading the ſecond of the two former reſolutions, that the Committee had put the following conſtruction on their ſecond reſolution, *viz.*

Reſolved, "That the counſel are not now at liberty to "enter into the queſtion of rateability (H)."

He then ſaid, that they were to judge how far they would proceed under this reſtriction, and that the Committee were willing to adjourn till Monday. (☞ This was Saturday) that they might have time to conſider and prepare ſuch evidence as could now be offered.

The counſel differed ſtill about the extent of the reſtriction. On the part of the petitioner, they thought they might yet be admitted to prove, that Felton, and the others whom they meant to qualify, had been rated up to 16th September 1774, for certain property, and were, notwithſtanding, left out of the rate; that this would be clear and ſufficient evidence of miſconduct in the pariſh officers; that, if ſuch evidence were not admitted, miſconduct in making a rate could never be proved, if the churchwardens and overſeers were wiſe enough to be ſilent, and not accuſe themſelves, or declare their motives.

On the other ſide it was ſaid, that improper motives for leaving perſons formerly rated, out of the rate, ought firſt to be proved, before ſuch omiſſion could be received as evidence of miſconduct. That, in this caſe, no improper motives had been proved, although many different ſorts of evidence

(1) Burn, vol. iii. p. 508.

dence of ſuch motives might have been given, if they had ever exiſted. That a great influx of new voters would afford a ſtrong preſumption againſt the fairneſs of a rate, but that here they had only found five new perſons on the rate. That declarations of the pariſh officers might be proved, but that here nothing of that ſort had been ſhewn, but a piece of idle converſation, expreſſing merely the wiſhes of Hetherington; and *that* after the election was over.

The Committee deſired the counſel on the part of the petitioner to ſtate diſtinctly what evidence they meant to offer reſpecting Felton; which they did, *viz.*

To ſhew that he was rated in the rates immediately preceding that of September, 1774, for certain property: That in September, 1774, he ſtill continued in poſſeſſion of that property: That his circumſtances were then as good as they had been whilſt he was rated: And that, whilſt rated, he had always paid the rates.

The court being cleared a third time, and the Committee having deliberated for ſome time, and the counſel being again called in, the Chairman told them that he was directed to inform them of the following reſolution:

Reſolved, "That the Committee are of opinion, that "the evidence which the counſel for the petitioner propoſe "to offer, is inconſiſtent with the reſolution which the "Committee have already come to."

Upon this, the counſel for the petitioner ſaid, they would give the Committee no farther trouble.

There was no general ſumming up on the part of the petitioner; no new caſe opened for the ſitting member, and, conſequently, no general reply. But it will be obſerved, that, in the beginning of the cauſe, the counſel for the petitioner produced evidence tending to impeach five votes as given by perſons fraudulently rated, and two as given by *pretended* houſeholders within the precincts of the Minſter, who as they alledged, were not houſeholders. If the evidence had amounted to proof of thoſe allegations, and the Committee had thought all the ſeven votes bad, there would have remained on the poll an equal number of votes for Wyldbore and for Phipps. The Committee, on that ſuppoſition, muſt have determined that, as between them two, the election was void.

But, as the counſel for the petitioner did not think fit to ſum up, and obſerve upon the evidence they had produced,

we

we muſt conſider this as an admiſſion, on their part, that enough had not been proved to diſqualify all the ſeven voters. It would ſeem likewiſe, that the Committee, according to the principle of their reſolution, by which they would not permit the connſel to go into the right to be rated of thoſe who had been left out of the rate, muſt alſo have looked upon themſelves as not authoriſed to hear evidence againſt the right of thoſe who had been put upon the rate. Every reaſon for their not going into the rateability of the one claſs, is equally valid againſt their enquiring into that of the other. The evidence they did hear with regard to the five votes, muſt, therefore, be conſidered as if it had never been produced; as offered and received by a ſort of ſurprize, before the objection had been taken and argued by the counſel. It certainly might have been taken at the beginning, and as it did prevail when taken, we muſt infer that it would have prevailed then. If this inference is fair, the Committee muſt have entirely diſregarded the evidence concerning the five votes. If they did, it was unneceſſary for them to attend to what had been offered reſpecting the other two; ſince, to have ſtruck them off, would not have deprived the ſitting member of the majority. For theſe, as well as the general reaſons given on former occaſions, I have thought it perfectly uſeleſs to ſtate what the particnlar evidence was reſpecting the ſeven votes (1).

It may be fairly conjectured, that the Committee could not think the evidence given concerning the five ſcot and lot men, ſufficient to ſhew fraud in putting them on the rate. If they had been of that opinion, they ſcarcely could have refuſed (conſiſtently with their own reſolution) to have gone into the rateability of Felton and the others. The fraud in the firſt caſe would have tainted the whole, as the making the rate is the ſingle act of the ſame perſons.

In the courſe of the evidence concerning the conduct of the pariſh-officers and Juſtices, one Edward Baſs, a witneſs, was going to give an account of a converſation in 1768, between him and William Strong, the Juſtice, about the reaſons for making a private rate.

To this evidence the counſel for the ſitting member objected.

After

(1) *Supra*, p. 35.

After argument, the court was cleared; and when the counſel were called in, the Chairman informed them, that the Committee had come to this reſolution:

Reſolved, "That the counſel do deſiſt from examining "the witneſs to what William Strong, the Juſtice, ſaid to "him reſpecting the rate in 1768.

On Monday, the 27th of November, the Committee, by their Chairman, informed the Houſe, That they had determined,

That Mr. Wyldbore, the ſitting member, was duly elected (1).

(1) Votes, p. 127.

NOTES

NOTES

ON THE CASE OF

PETERBOROUGH.

PAGE 32, 43, 46. (A.) I do not find that either by ſtatute, or any deciſion, a perſon qualified to ſerve as a pariſh officer, can excuſe himſelf, becauſe he has ſerved the office before; and yet it appeared to me that this was aſſumed as law by the counſel for the petitioner, and not contradicted on the other ſide. If the ſame perſon were for ſeveral years together appointed an overſeer, merely for the purpoſe of vexation, and giving him trouble, "there being other ſufficient ſubſtantial houſeholders within the "pariſh," the quarter ſeſſions on that ground would, perhaps, quaſh the appointment. Apothecaries within London, and ſeven miles thereof, and all apothecaries in any other place, who have ſerved ſeven years apprenticeſhip, are exempted from the office of overſeer, and all pariſh offices, by 6 Will. III. cap. 4. and an attorney cannot be choſen overſeer or churchwarden, or to any other office againſt his will. Com. Digeſt. 476. from Cro. Car. II. 585.

P. 39. 41. 42. (B.) Upon as acurate an inveſtigation as I have been able to beſtow on the ſubject, I am inclined to think that "*ſcot and lot*;" had not originally a ſpecific ſignification expreſſive of any particular local or parochial taxes as I once conceived (*ſupra*, vol. 1. p. 70). Both words are of Gothic or Teutonic origin, and are found in all thoſe modern languages which have German, or Latin with a certain proportion of German intermixed, for their baſis. "*Schoſs*" in modern German, and "*ſchot*" in Dutch, mean "impoſt, tax, contribution" in general. *Scotto* in Italian, and *Eſcot* or *écot* † in French, are, I

† "*Il s'arrêta triſtement à la porte d'un cabaret. Deux hommes habillés de bleu "le remarquerent: Camarade, dit l'un, voila un jeune homme tres-bien fait, et qui "a la taille requiſe: Ills s'avancerent vers* Candide, *& le prierent à diner tres-"civilement. Meſſieurs, leur dit* Candide, *avec une modeſtie charmante, vous me "faites beaucoup d'honneur, mais je n'ai pas de quoi payer écot.*" Cand. ch. 2.

believe,

believe, only uſed in the ſame familiar ſenſe with "*ſhot*" in Engliſh, for the ſhare of a reckoning. "*Schot-vry*, in Dutch, correſponds exactly to our phraſe "*ſcot-free**," and "*ſchot en lot*," in that language, is explained to mean the ſame thing with "*ſchot*," taken alone. So, I am perſuaded, "*ſcot and lot*," is a mere tautology in Engliſh, adopted for the ſake of the jingle in the ſound; there being many inſtances of a like ſort in all languages. In the laws relating to the ſewers both words are indifferently applied to the aſſeſſments made by the Commiſſioners. This appears—By the extracts from the ordinance concerning Romney Marſh cited in Spelman (Title *ſcot* and *ſcottum*);—By the ſtatute of 3 and 4 Edw. VI. cap. 8. which ſpeaks of "all "*ſcots*, *lots*, and *ſums of money*, taxed by virtue of the commiſ- "ſions of ſewers;—By 7 Ann. cap. 10. which mentions *lot* or *charge* as ſynonimous;—And by many other inſtances which might be adduced. *Scot*, *ſhot*, or *lot*, therefore, was the ſhare paid of the particular contribution which happened to be in contemplation when the term was employed, whether it was an aſſeſſment for the ſewers, a reckoning in a tavern, or the parochial taxes. The argument of the counſel for the petitioner in this caſe of Peterborough, drawn from the expreſſion "*bearing* "*lot*," is rather ingenious than concluſive; for taking "*lot*" (as I have ſuppoſed) to be ſynonimous with "*ſcot*," and to ſignify a ſum of money, "*to bear lot*" would be a very proper expreſſion, as we ſay to "bear an expence," or to "bear a tax." In the ſtatute for regulating elections within the city of London (11 Geo. I. cap. 18.) "paying to the rates in lieu of watch "and ward," is enumerated among the circumſtances which in London conſtitute the payment of ſcot (‡), It muſt be acknowledged, that in the ſame ſtatute there ſeems to be a diſtinction made between the payment of ſcot, and the bearing lot. The electors of aldermen and common council-men muſt be, perſons paying ſcot, as thereby deſcribed, and alſo "*bearing lot when* "*required*." But it does not at all appear what is meant by "*bearing lot*." It is likewiſe ſpecially enacted, that they muſt be *houſeholders*, which ſeems to be an acknowledgement of the legiſlature, that the deſcription of "*paying ſcot and lot*" does not neceſſarily comprehend the qualification of being "a houſe- "holder."—I am informed by a very ingenious friend, and one well acquainted with the laws of Scotland, that the expreſſion of "To *ſcot and lot*" in the burgeſs's oath in that country, does not "nor,

* The popular ſenſe of the expreſſion "*ſcot-free*" may be well illuſtrated by the following example. "It was a rule with this great chancellor (Bacon) not to ſell injuſtice, but never to let juſtice go *ſcot-free*." Cited in Hurd's Dial.

‡ *Vide* Caſe of Seaford, *ſupra*, p. 20.

"nor, as far as he can learn, ever did, mean "to pay any "determinate ſpecifix tax or duty," but only the burgeſs's proportion of the common taxes and ſervices affecting the borough.

However, the ſenſe of "*ſcot and lot*" in the reſolutions of the Houſe of Commons is not to be aſcertained by the ancient meaning of the words, or by arguments drawn from their etymology, or their ſignification in other languages or countries. There are no deciſions on the rights of elections in the Journals, till the reign of James I. after the poor-rate was eſtabliſhed. Moſt of thoſe concerning boroughs where the right is declared to be in perſons paying ſcot and lot (of which there are in all about thirty, beſides agreements with regard to about twelve more) have been made either in the preſent century, or towards the end of the laſt; and it is clear that in modern times "*ſcot and lot*" has always been underſtood to mean pariſh taxes, or "pariſh payments;" which laſt is Dr. Johnſon's explanation. (*Vide* Johnſon's Dict.) Theſe determinations will all be found to have been made upon evidence concerning the poor and church-rates. We muſt, therefore, I think, conclude that the Houſe, by "the payment of "ſcot and lot" have meant the payment of thoſe taxes, and nothing elſe.

There is, indeed, one very forcible argument againſt conſidering "the payment of ſcot and lot" in determinations on the rights of election, peculiarly to mean, "the payment of the poor-rate," and it is this; although, by the ſtatute of Geo. II. the laſt determination of the Houſe is final, and becomes law, however abſurd or unjuſt; yet ſtill, in reaſoning on the ſubject, we muſt ſuppoſe that, where the right of election in a maiden borough has come to be decided by the Houſe, and where that right does not depend on any charter, but is *preſcriptive*, the deciſion is formed on evidence of *preſcriptive* uſage, and that it is only a declaration of what the right has been beyond time of memory. Now it is aſked, How is it poſſible that, where the Houſe has declared a preſcriptive right of election to be in the payers of ſcot and lot, they ſhould mean thoſe who pay the poors tax, ſince that was unknown till the time of queen Elizabeth? The truth is, the rule of legal preſcription cannot be applied to this ſubject; for, in the firſt place, according to the ſyſtem of a great many writers on the conſtitution, the repreſentation of boroughs commenced conſiderably within the time of legal memory; and, ſecondly, there are numerous inſtances where the right of election reſting merely on uſage, has been determined, or agreed, to depend on circumſtances whoſe exiſtence is of much more modern

date

date than the period fixed by the law, as the boundary of legal memory. In ſuch caſes, where there has been a determination, to try them by the rule of preſcription would be impoſſible, and even where the right has been long acquieſced in, and undiſputed, without a determination of the Houſe, it would occaſion the utmoſt confuſion. *(Vide infra,* IId Caſe of Cricklade. Note (C).)

P. 40. (C.) It has never been determined, that Juſtices of the Peace are *exempted* from ſerving the office of overſeer. In the caſe of the King and Gayer, Hill, 30 Geo. II. a perſon who was an acting Juſtice of the Peace, and alſo a lieutenant of marines, on half-pay, having been appointed overſeer, the appointment was quaſhed by an order of ſeſſions, and that order confirmed by the court of King's Bench. But the court did not decide, that the office of Juſtice of the Peace and overſeer are incompatible; or that a Juſtice can of right demand an exemption from being overſeer. Burr. Settl. Caſes, 245.——I believe, there is no office of any ſort, if a man is a ſubſtantial houſeholder, and chooſes to act as overſeer, which renders him *incapable* of being appointed.

P. 44. 47. 52. (D). In Tawney's Caſe, (Lord Raymond, 1009 to 1013) Lord Holt, Ch. Juſt. ſaid, "The churchwardens and overſeers, with the confirmation of the Juſtices, may "order a ſum of money to be levied for the relief of the poor, "without the concurrence of the pariſh."

P. 45. (E) As in this caſe, very probably, decided the fate of this election, and there is only a ſhort abridgment of it printed in Mr. Bott's Poor's Laws, p. 57. I have inſerted a very full note of it; which I have reaſon to think, was taken by a gentleman of great eminence at the bar.—Mr. Bott cites Mr. Ford's MSS. for his account of the caſe; but there muſt be ſome miſtake in this, for Mr. Ford died before Hil. 27 Geo. II.

THE KING againſt the JUSTICES of BERKSHIRE, or,

THE CASE of the Pariſh of ST. HELEN, ABINGDON. Hil. 27 Geo. II.

"It was moved laſt term to quaſh two orders made by the "Juſtices of the Peace of Berkſhire, at their quarter ſeſſions, "on an appeal from the poor's rate for Abingdon, upon the "following exceptions:

"1ſt, That it appeared, that notice of the appeal was not "given, till the day before the ſeſſions began; whereas there "ſhould have been eight days notice: That the Juſtices (with a "view,

" view, perhaps, to ſupply the defect of notice) adjourned the " appeal, by the firſt of their orders, to the next day, and di- " rected the overſeers, &c. to attend them with the rate: That " on the next day, accordingly, they went on to hear, and made " the ſecond order on the merits; whereas they ought, (as was " inſiſted) whenever there is not proper notice, to adjourn the " appeal to the next ſeſſions.

" 2dly, That they ſhould have inſerted the whole rate in " their order.

" 3dly, That the complaint was, only, that ſome perſons " who ought to have been charged, were omitted in the rate; " but the Juſtices had gone beyond the complaint, and had " ſtruck out one of the names inſerted in it, which was no part " of the complaint.

" 4thly, That the perſons whoſe names were added by the " order, to the rate, did not appear, by the order, to be inha- " bitants of the pariſh, nor to have any real, or perſonal, eſ- " tate there; and, by the 43 of Eliz. no perſon is liable to be " rated but in one of theſe inſtances.

" 5thly, *That the names of perſons omitted in the rate, (which* " *omiſſion was the ground of the complaint) ought to have been ſet* " *forth in the appeal; and notice ought to have been given to them.*

" Upon this, a rule, *niſi*, was granted.

" On another day, in the ſame term, Sir Richard Lloyd ſhow- " ed cauſe againſt the rule.

" As to the firſt objection, he obſerved, That the ſtatute 17 " Geo. II. cap. 31. § 4. makes the Juſtices ſole judges of what " notice is reaſonable; and they had thought this ſo. Beſides, " this notice was the beſt that could be given from the nature of " the caſe; the rate being made on Saturday, and publiſhed on " Sunday; notice of appeal was given on Monday, and on " Tueſday the ſeſſions were held.

" To the 2d objection, he ſaid, it could not be neceſſary to " inſert the rate in the order; for, that the appeal was not from " any thing in the rate, but for what was omitted; and left out " of it: That the order of the ſeſſions was, to amend it, by " adding what was omitted; and, therefore, nothing but their " own amendments were to be inſerted in their order.

" To the 2d objection, he ſaid, the fact was, that they had " left the ſum charged as they found it, and had only changed " the name of the perſon who was to pay it; and this was occa- " ſioned by the overſeers charging the mother, when the ſon " (whoſe name the Juſtices had inſerted inſtead of her's) was, in

" fact,

" fact, the houſekeeper: That this, as he apprehended, they " had, by the ſtatute, a right to do:—But, if the court thought " otherwiſe, they might adjudge that part of the order to be " wrong, and confirm the reſt.

" To the 4th objection, that the act which gives the Juſtices " juriſdiction, does not require that the perſons added ſhould " be mentioned to be inhabitants, &c. though, under 43 Eliz. " which relates to rates by pariſh officers, it may be neceſſary: " That this might have been a good objection to the rate, if " the perſons aſſeſſed had not been mentioned in the *title* " as inhabitants, &c. but could be none to the order: That, " in a rate to make one pariſh contribute to the relief of ano- " ther, it is neceſſary that this pariſh ſhould *in fact* be of ability, " but not that it ſhould *appear* ſo: That it was ſolemnly deter- " mined in the caſe of the King againſt Lloyd, (2 Strange, 996.) " that the Juſtices need not ſet forth any thing, but what is ne- " ceſſary to found their juriſdiction: That this would apply " alſo,

" *To the 5th objection, which was, that the names of the per-* " *ſons omitted, ought to have been inſerted in the appeal: That* " *the Juſtices need only return, that there was an appeal.*

" That another objection had been mentioned, *viz.* that the " appeal ought to have ſpecified all the appellants: That this " would admit of the ſame anſwer, and that, on the appeal of " any one perſon, the Juſtices might determine every objection " to the rate: That, in the caſe of the King againſt Almanbu- " ry, (Hil. 1 Geo. I. in Forteſcue's Reports, and 1 Str. 96.) it " was determined, that, had the Juſtices only ſtated that there " was an appeal, without naming any appellant, it would have " been good: That every man liable has a *right* to be rated; " and, as appears by the caſes of the King againſt Weobly, (2 " Str. 1259) and the King againſt Fludyer *, if the pariſh officers " refuſe him, he may appeal to the ſeſſions."

" Adjourned for the opinion of the court, which was now " given, as follows:

" WRIGHT.

" This was a motion to quaſh two orders of ſeſſions, made " on an appeal from a poor's rate. By the firſt, they adjourned " the appeal, which appears to have been received the firſt day " of ſeſſions, to the next day, and directed notice to be given " to the overſeers, &c. to attend them at that time, with the " rate. By the ſecond order, they proceeded to adjudge the

" notice

* *Quær.* Where reported?

" notice reaſonable, and the complaint juſt; and then to inſert " and ſtrike out, as they thought fit.

" To theſe orders ſeveral objections have been taken.

" 1ſt, That by the firſt order, the Juſtices appear to be con- " vinced that proper notice of the appeal had not been given; " yet, inſtead of adjourning the conſideration of it to the next " ſeſſions, as the act directs when there ſhall not be ſufficient " notice, they take upon themſelves to direct a notice, and to " adjourn to the next day only. This is the objection. But " in anſwer, it is ſaid; The notice directed, is only to attend " with the rate; The notice of appeal they adjudged ſufficient, " and the adjourned day was not another, but the ſame ſeſ- " ſions.

" 2d, That the rate is not returned.——It is not neceſ- " ſary.

" 3d, That they have ſtruck out the name of a perſon not " complained againſt. This is a ſtrong objection; but had it " ſtood ſingly, that part of the order might have been quaſh- " ed, and the reſt confirmed. This part of it was indeed given " up.

" 4th, That the perſons inſerted are not mentioned to be in- " habitants, &c. ſo that it does not appear they were ratea- " ble. I do not think it neceſſary that this ſhould appear. " The Juſtices have ſatisfied themſelves in that reſpect.

" 5th, *That the names of the perſons inſerted by the Juſtices* " *were not ſet forth in the appeal.* I do not think it neceſſary " that the ſeſſions ſhould return the whole appeal. It is ſuffici- " ent, if they return that there was an appeal.

" The principal difficulty with me is this:—They adjudge, " that ſeveral perſons were left out, without ſufficiently diſtin- " guiſhing who and what thoſe perſons were; then they proceed " to inſert 15 or 16. Now, my doubt is, whether the Juſtices " ought not to have adjudged what perſons were left out, and " then inſerted the names of thoſe perſons, and thoſe only; for " theirs is a limited authority.

" DENISON, J.

" I do not think it neceſſary to go particularly through the " ſeveral objections; my brother has ſufficiently anſwered the " firſt.

" As to the 2d, I remember a motion in the caſe of Weobly, " for removing a rate, and it was ſaid *then*, that the rate could " not be removed, though there is an old determination to the " contrary *. But the queſtion here is, whether or not they ought " to have ſet forth the rate;—which I do not think neceſſary.

* *Quære.*

" Whether the perſons inſerted have or have not been heard, " is not to the preſent purpoſe, and therefore I ſhall give no " opinion, as to the neceſſity of it.

" *What ſticks with me is, whether the notice to the church-wardens, &c. who were to make their defence for not inſerting the perſons whoſe omiſſion is complained of, ought not to have expreſſed who thoſe perſons were, that they might have been able to account, at the ſeſſions, for having omitted them, and come prepared to anſwer the complaint. It ſeems more reaſonable that their names ſhould be inſerted. Orders are frequently quaſhed for uncertainty, in omitting to ſtate that the perſons complained of are chargeable, and the like. If this can be cleared, I ſee no weight in the other objections, nor impropriety in the orders. The whole is the uncertainty of the complaint.*

" It is not neceſſary to ſtate the names of the appellants, even " in the proceeding in a court of law; and there is no weight in " the other objections."

FOSTER, J.

" It is incumbent on the court to lay down ſome rule in this " new caſe. The ſame difficulty ſticks with me, that occurred " to my brother Deniſon. I am not clear, that the perſons in- " ſerted are inhabitants, &c. of the pariſh. The Juſtices " are here in the place of the church-wardens and overſeers. " As it is neceſſary for the overſeers and church-wardens to " ſhow that the perſons charged are the proper objects of their " authority, ſo, ſince the Juſtices, in this caſe, exerciſe an ori- " ginal authority, from which there is no appeal, it is equally " neceſſary for them to do ſo."

" DENISON, J.

" I meant, That the names of the perſons ſhould be expreſſ- " ed, and that they are liable to be charged."

" WRIGHT, J.

" I do not think it neceſſary that this ſhould appear on the " complaint, but it ſhould appear ſomewhere, that the per- " ſons inſerted by the Juſtices are liable."

DENISON,

DENISON, J.

" Suppoſe ten are complained of. The Juſtices may approve " of the inſerting of five, and not of the reſt."

" FOSTER, J.

" This is an original authority, founded on a complaint, " the uncertainty of which has often been held ſufficient to quaſh " an order of removal."

" The caſe was ordered to ſtand over for a day or two, when " Wright, J. agreeing with the other two, the orders of the " ſeſſions were quaſhed."

Throughout this report, *the notice of appeal* is ſometimes called *the appeal*, and ſometimes *the complaint*. Indeed the notice is the only inſtrument which brings the appeal before the court of quarter ſeſſions; and, though there is no proviſion in any ſtatute which requires even that it ſhould be in writing yet, by the general practice, as much nicety is expected in penning a notice as in drawing a declaration; and it is as common at ſeſſions to object to the form of a notice of appeal, as it is in Weſtminſter Hall to demur to the form of a declaration. This may ſerve in ſome degree to ſhow how ineffectual the plans would be which have been propoſed for getting rid of the niceties of ſpecial pleading. It is as hard upon a party to be prevented from entering on the merits of his cauſe from an informality in an inſtrument of modern invention called a *notice*, as if it happened from a like informality in a *declaration*. The difference is, that blunders would be more common in the former, becauſe the technical modes and forms of them have not been aſcertained by a long train of deciſions.

P. 46. (G). I have examined the entry of this reſolution in the original minutes, and it is in the following words:

" The counſel called in, and acquainted by the Chairman, " that the Committee are of opinion, that perſons of rateable " property, not being rated, and proving no miſconduct againſt " any perſons in the management of the rate, to account for their " not being rated, are not entitled to vote."

The reader will obſerve, that there is no material difference between theſe words and thoſe in vol. I. Caſe of St. Ives.

P. 52. 48. 52. (F). The legiſlature has clearly made a diſtinction between the appellate juriſdiction in caſes of rates and of removals. Neither the ſtatute of 13 & 14 Car. II. cap.

12. nor that of 8 & 9 Will. III. cap. 30. ſay any thing of corporation, or local juſtices. The firſt enacts, (§ 2.) "That "perſons thinking themſelves aggrieved, may appeal to the Juſ- "tices of peace of the ſaid county." And, by the other, "(§6.) "The appeal ſhall be had, proſecuted, and determined "at the general or quarter ſeſſions of the peace, for the county, "diviſion, or riding, wherein the pariſh, townſhip, or place "from whence ſuch poor perſon ſhall be removed, doth lie, "and not elſewhere." The reaſon why an appeal in caſes of removal ſhall not be to local Juſtices, is given in the caſe of the King and Malden, (cited *ſupra*, p. 52.) "For then," Lord Ch. J. Parker ſaid, "there would be an appeal *ab eodem & "eundum*, there being, it may be, the ſame Juſtices ſitting "who made the order." That the Juſtices act *judicially* in making orders of removal, appears evidently from the caſe of the inhabitants of Berry and Arundel, 9 Will. III. (in 2 Salk. p. 479.) where the order was quaſhed, becauſe it did not appear that there had been an *adjudication* of the Juſtices where the *pauper* had his laſt legal ſettlement. That, in the allowance of rates, they act only *miniſterially*, was determined in the caſe of the King and the Juſtices of Dorcheſter, 7 Geo. I. (Strange, 393.) when the court ſaid, "That the two Juſtices are neceſſa- "ry to ſign the rate *only by way of form*;" and in that of the King and the inhabitants of Uttoxeter, as cited by Bott, p. 58, from Mr. Ford's MSS *. It appears, therefore, that the legiſlature has not thought there is any reaſon why the ſame Juſtices who allow a rate, *miniſterially*, may not, *judicially*, aſſiſt at the trial of an appeal from ſuch rate, at the quarter ſeſſions. Nay, as two Juſtices are ſufficient to conſtitute that court, (Blackſt. vol. iv. p. 268. 4to) the two who allowed the rate may ſit as ſole judges on the appeal. Yet, by giving leave, in caſes where there are not four local Juſtices, to appeal to the county ſeſſions, the ſtatute ſeems to ſuppoſe that there may be partiality exerciſed in allowing the rate; and, to ſhow how difficult it is to make a complicated ſyſtem of law entirely conſiſtent, I do not find any proviſion in the ſtatutes to prevent two *county* Juſtices, who have made an order of removal, from ſitting as the only

* In the very ſhort note of this caſe in 2 Str. p. 932, the determination of this point is not mentioned. It is well known that, in Mr. Ford's Manuſcript, a great many of the caſes in Strange are reported at much greater length, and more completely, than by that author. I have had an opportunity of peruſing his account of this caſe, and ſeveral others; but although thoſe who have the pleaſure of knowing his ſon, know how ready he is to permit his friends to conſult this valuable work, it is much to be wiſhed that he may ſome time or other make it public for the general benefit of the profeſſion.

only judges at the ſeſſions, on an appeal from their own order. Probably the court of King's Bench would ſupply the defect, by deciding that the principle of the King and Malden extends to this cauſe.

P. 55, (H). In general, a man muſt be actually rated in, order to have a right to vote as one paying ſcot and lot. The very reſolution in the caſe of Newark (*ſupra*, p. 47. ſhews that, in other caſes, where words expreſſive of rateability are not uſed, rateability is not ſufficient. Yet there may be caſes where *that, ex neceſſitate rei*, muſt be the only rule even when the words of the determination of the Houſe are "*paying* "*ſcot and lot*." If in a borough, where there are no other electors but inhabitants paying ſcot and lot, it ſhould happen that no poor's rate has been made for a long courſe of years (a caſe not impoſſible, though now perhaps not very probable) and that there is no inhabitant alive who ever was rated, there muſt be members choſen, and rateability would be the only poſſible meaſure of the right of election. If an aſſeſſment for the poor has been unneceſſary, and has not taken place, only for a few years, ſhall the laſt rate be the rule? This can hardly be the caſe, becauſe all, or many, of thoſe on that rate may, at the time of the election, be reduced to poverty, and other ſubſtantial inhabitants may have come into the borough, for which reaſon the court of King's Bench has determined that there cannot be a ſtanding rate, (2 Salk. 526.) Therefore, in this caſe alſo, rateability muſt be the ſtandard. The difficulty is where to draw the line, and fix when the circumſtances of the voters ought, and when they ought not, to be enquired into by Committees. —It was in a manner admitted on the part of the petitioner, in this caſe, that, where there has not been time to appeal from a rate, the Committee ought to go into the rateability; becauſe, under ſuch circumſtances, the rate (being complained of before them) ought to go for nothing. But might it not be contended, that the rate immediately preceding, if not appealed from, or ſet aſide, ſhould, in ſuch a caſe, be the rule, unleſs there has been ſuch an interval as to render it probable that there have been alterations in the circumſtances of the perſons rated? When a rate has been appealed from, and is confirmed, the deciſion of the ſeſſions, by the ſtat. of Eliz. (43 Eliz. cap. 2. § 6.) *concludes and binds* all the parties to the appeal. Hence the court of King's Bench will never go into the merits of a rate; "for," as is ſaid in the caſe of Dorcheſter (cited *ſupra*, p. 67. Note F.) "whether a rate be fair or not, was never intended for their "juriſdiction." A rate not appealed from is of the ſame force as if appealed from, and confirmed. But ſhall this extend to a Committee of Elections?—In the caſe of Seaford, rateability

was gone into, although there had been time for an appeal, and none had been brought. But *there* the Committee may have thought there had been ſufficient miſconduct proved to entitle them to go into it, conſiſtently with the reſolution in St. Ives. Beſides, the objection was not taken by the counſel.

Committees have gone into the rights of perſons claiming to be freemen, who had been in poſſeſſion long enough for *Quo Warrantos* to have been brought againſt them in the court of King's-Bench; the only tribunal for the direct trial of corporate rights. In the caſe of Bedford, it was not only queſtioned whether perſons claiming as honorary freemen, had a right to vote, but alſo whether they were legal freemen, and, although the perſons objected to on that ground had been in poſſeſſion for years, and no *Quo Warrantos* had been brought againſt them, the Committee tried the queſtion of their title. (*Vide ſupra*, vol. ii. p. 41, &c.)—There is this difference between perſons voting as payers of ſcot and lot, and as freemen: When a man is put on the poor's rate, the direct object is not the acquiſition of any franchiſe whatever (at leaſt the ſtatute under which the rates are made had no ſuch thing in view); but, when a man is admitted to his freedom in a parliamentary borough, the acquiſition of the right of voting, if annexed to the freedom, is a neceſſary conſequence, and muſt be preſumed to be one of the objects he has in contemplation: He means to entitle himſelf to all the privileges of a freeman, and to *that* among the reſt. Can this difference give Committees of election a more free and immediate juriſdiction in the one inſtance than in the other? If it does, they are ſtill leſs confined in their right of judging concerning the title to be on the freeholders roll in Scotland; for, as to *that*, the ſole object in being put on the roll, and the ſole franchiſe gained, is that of voting for the commiſſioner to Parliament; unleſs the right of voting on the making up the roll itſelf ſhould be conſidered as a diſtinct privilege.

With regard to the reſolution of the Committee in the preſent caſe, for reſtraining the counſel from giving evidence of the rateability of the voters, if we examine it by the rule laid down in the St. Ives' Caſe, it is of a complex nature; and comprehends a determination both of fact and of law. If the Committee had thought that by the general evidence, *already given*, miſconduct had been proved, they muſt have gone into the rateability. Therefore, in the capacity of a *jury*, they found that it was *not* proved by that evidence. Then, as a *court of law* adopting the rule in the caſe of St. Ives, they held that they could not receive the evidence of rateability; for that rule is, That, *no miſconduct being proved*, perſons, though of *rateable property*, are not entitled to vote. Now the evidence tendered

tendered reſpecting Felton was *only* to prove that he *was* of rateable property.

It is very true, that, if the rates are to have ſuch binding authority, the pariſh officers, who are generally men in an inferior ſtation, and expoſed to undue influence, will have a very dangerous power over elections in ſcot and lot boroughs. But this is a defect in the conſtitution of thoſe boroughs, and, like the abuſe of the right of making honorary freemen in others, can only be properly and effectually remedied by the interpoſition of the legiſlature.

XXVIII.

THE

CASE

Of the BOROUGH of

IVELCHESTER,

In the County of SOMERSET.

The Committee was choſen on Friday, the 24th of November, and conſiſted of the following Gentlemen:

Frederick Montagu, Eſq; Chairman,	Members for	Higham Ferrers.
John Frederick, Eſq;		Newport, Corn.
Thomas Hill, Eſq;		Leominſter.
Hon. Charles Marſham,		Kent.
Hon. Thomas Francis Wenman,		Weſtbury.
William Drake, jun. Eſq;		Agmondeſham.
John Dyke Acland, Eſq;		Callington.
Hon. Charles Greville,		Warwick.
Lord Guernſey,		Maidſtone.
John Adams, Eſq;		Carmarthen.
Filmer Honywood, Eſq;		Steyning.
Lord Charles Spencer,		Oxfordſhire.
Chriſtopher Griffith, Eſq		Berkſhire.
NOMINEES, *Of the Petitioner,*		
Richard Whitworth, Eſq;		Stafford.
Of the Sitting Members		
Herbert Mackworth, Eſq;		Cardiff.

PETITIONERS.

Richard Brown, Eſq; and Inigo William Jones, Eſq; James Corry and John Cox, on behalf of themſelves and others, being inhabitants, houſeholders, pariſhioners, and voters within the borough of Ivelcheſter.

Sitting Members.

Peregrine Cuſt, Eſq; William Innes, Eſq;

COUNSEL.

For the Petitioners.

Mr. Mansfield, Mr. Alleyne.

For the Sitting Members.

Mr. Lee. Mr. Morris.

THE

THE

CASE

Of the BOROUGH of

IVELCHESTER.

ON Saturday, the 25th of November, the Committee being met, the two petitions were read. They were in ſubſtance nearly the ſame.

That of Mr. Brown and Mr. Jones ſet forth; that Mr. Chriſtopher Lockyer, bailiff and returning officer of the borough of Ivelcheſter, being a known friend to the ſitting members, had ſhewn great partiality in their favour; and had admitted many perſons to poll for them who had no right to vote, and rejected ſeveral perſons who had a right to vote, and had tendered their votes for the petitioners: That the ſitting members, by themſelves, their friends, and agents, were guilty of bribery and treating: That the petitioners had a majority of legal votes, and ought to have been returned (1).

The petition of Corry and Cox alledged, That they were legal voters, and had tendered their votes, but were rejected; while others, claiming under the ſame right, were admitted to vote for the ſitting members, as were alſo perſons who had no right: That money and proviſions were given, and promiſes of rewards made, to many of the voters, to influence them to vote for the ſitting members; by means of which undue influence they were returned (2).

Although the allegations in both petitions, of the refuſal of legal votes, and the admiſſion of illegal ones, ſeemed to

(1) Votes, p. 30. 31 Oct. 1775.
(2) Votes, p. 66. 8 Nov. 1775.

to import that the petitioners meant to raiſe a queſtion concerning the right of election, their counſel confined themſelves, on the trial of the cauſe, to the charge of bribery and treating.

There is no laſt determination of the right of election in Ivelcheſter. The conſtitution of the place is as follows: It is a borough by preſcription, and, according to Willis (3), ſent members to Parliament from the time of Edward I. till 34 Ed. III. From that time it did not chooſe repreſentatives till 12 Edw. IV. nor, after that year, till 18 Jac. I. when it was reſtored to its ancient privileges. By a charter granted 3 & 4 Phil. and Mar. the inhabitants were incorporated by the name of the bailiff and burgeſſes of Ivelcheſter. There was to be a bailiff and twelve capital burgeſſes, who were to chooſe annually, on the Monday before Michaelmas, one of themſelves to be bailiff for the enſuing year; on the death of any of the capital burgeſſes, his or their place to be ſupplied out of the common burgeſſes, by the election of the remaining capital burgeſſes. The charter ſays nothing of the qualification neceſſary to common burgeſſes; nor of the mode of electing the members of Parliament.

28 Jan. 1702-3. By the report of Mr. Bromley, Chairman of the Committee of privileges and elections, to whom petitions complaining of an undue election and return for Ivelcheſter had been referred, it appears;

"That the right of election was *agreed* to be in the "bailiff, capital burgeſſes, and inhabitants, not receiving "alms (4)."

And on the preſent occaſion, both parties ſeemed to admit, that, by the *uſage* of the borough, an inhabitant, in order to be qualified to vote, muſt be a houſeholder, and have a legal ſettlement (5).

The numbers on the poll were,

For	Mr. Innes,	103
	Mr. Cuſt,	102
	Mr. Brown,	53
	Mr. Jones,	53

The

(3) Willis, Notit. Parl. vol. i. p. 45.
(4) Journ. vol. xiv. p. 147. col. 1.
(5) *Vide infra*, Caſe of Cricklade. Note (C.)

The counſel for the petitioners undertook to prove, that ſuch a number of the voters for Cuſt and Innes had been bribed, as, when deducted from the poll, would leave the majority of legal votes in favour of Brown and Jones, ſo as to entitle them to be declared duly elected. And, if they ſhould not ſucceed in affecting a ſufficient number of the votes for the ſitting members to anſwer that end, ſtill they ſaid they would prove acts of bribery by them or their agents, ſo as to avoid the election, by rendering them incapable of retaining their ſeats.

The counſel for the ſitting members, after attempting, by evidence, and argument, to overturn the caſe which had been made againſt them, endeavoured to prove, that Brown and Jones, by bribery, or promiſes, had diſqualified themſelves, even if the majority of legal votes had been in their favour, and conſequently that, at all events, they could not be declared duly elected.

All the acts of bribery, and the corrupt promiſes charged on the two ſitting members, were by the intervention of agents, and long before the *teſte* of the writ. It appeared, that, when the gifts and promiſes were made, Mr. Cuſt and "*his partner*" were mentioned to the voters, but Mr. Innes's name was not ſpecified, and was not at all known in the borough till a few days before the election; when he canvaſſed along with Mr. Cuſt and his friends. All thoſe who had engaged their votes for Cuſt and "*his partner*," voted for Innes as the partner.

The promiſes imputed by ſome of the witneſſes called on the part of the ſitting members to Brown and Jones, were ſaid to have been made directly by themſelves during their canvaſs on the election-week.

From a careful peruſal of the minutes, it appeared to me, that, ſuppoſing the gifts and promiſes to the voters for Cuſt and Innes ſuch, and ſo proved, as to deſtroy their votes, yet the evidence did not go to a number ſufficient to leave a majority of uncorrupted votes in favour of Brown and Jones. This being the caſe, it was, perhaps, unneceſſary for the Committee to form any opinion as to the operation of the evidence againſt the two petitioning candidates, ſince they, not having the majority of legal votes, could not, according to the law as at preſent underſtood, be entitled

to

to ſit (1). If the Committee had thought that no acts of bribery were brought home through the medium of perſons to be conſidered as agents, to the two ſitting members, they muſt have declared them duly elected. The Committee therefore, in order to determine that they were not duly elected, muſt have been of opinion, both that acts of bribery had been committed by perſons alledged to be agents for Mr. Cuſt and Mr. Innes, and that thoſe perſons were really to be looked upon as their agents.

☞ It was once my intention to have ſtated minutely the facts of which evidence was given, to eſtabliſh a privity and connection between thoſe perſons and the ſitting members, becauſe it ſeems to be a *deſideratum* with many, that certain rules ſhould be eſtabliſhed for aſcertaining what does, and what does not, amount to proof of agency, in caſes of bribery. On further conſideration I have altered my deſign, and have reſolved to omit this part of the caſe, as I had done in the former caſes of bribery, reported in the firſt and ſecond volumes of this work, and for the ſame reaſons. Thoſe reaſons I ſhall probably take an opportunity of mentioning on a future occaſion.

In the courſe of the cauſe many queſtions of evidence were argued by the counſel in like manner as in the former bribery cauſes. This indeed muſt happen in all caſes of this ſort.

1. The counſel for the petitioners having begun to examine John Loyd, concerning a converſation with certain voters, in which the voters had acknowledged that they had been bribed in order to vote for the ſitting members; The counſel on the other ſide objected to their purſuing their queſtions, ſo as to charge the ſitting members themſelves with bribery, by ſuch evidence. After ſome argument, the counſel for the petitioners agreed that evidence of the declarations of the voters could only be admitted to affect the voters themſelves, and not third perſons.—— The queſtion firſt put, objected to, and given up was, "Whoſe money did you underſtand it to be, which the "voters ſaid they had received?" The queſtion which it was agreed might be put, and which was put in lieu of the other, was, "Did the voters, when they ſaid they "had

1 *Vide ſupra*, vol. ii. Caſe of St. Ives, Note (B.) *Infra*, Caſe of Worceſter.

" had received the election money, ſay in whoſe intereſt " they were to vote, in conſequence of their taking this " money?"

2. One William Handover, a witneſs called on the part of the petitioners, was going to relate a converſation which paſſed between him and one James Pitman, alledged to be an agent for the ſitting members, and dead ſince the election.

This was objected to.

It was contended, that evidence of any acts of a ſuppoſed agent could not be admitted, until proof of his being an agent had been previouſly produced to the Committee; That the propriety of ſuch a rule is obvious, becauſe, otherwiſe, many days might be employed in hearing evidence againſt a perſon who might appear afterwards to have no connection with the cauſe; That, by the printed hiſtory of the two caſes of Hindon (1) and Shafteſbury it appeared that ſuch a rule had been laid down in both thoſe caſes.

On the other ſide the counſel inſiſted,

That it would be found impracticable to adhere to this rule, for that the circumſtances which were to prove that a perſon had bribed, and that, in ſo doing, he had acted as the agent of another, were very often the ſame, or, at leaſt ſo complicated together, that they could not be ſeparated; and that the Committee in the caſe of Briſtol had, on that account, over-ruled an objection like the preſent.

When the counſel had argued the point, the Chairman ſaid, that he had enquired into what had been done by the Committee, in the caſe of Shaftſbury, and that he had been informed by the gentlemen who had ſat in that Committee, as well as by ſome of the counſel in the cauſe, that, although on the firſt day of the trial a reſolution had been come to agreeable to what is ſtated in the printed report of the caſe, yet they had afterwards found ſuch inconvenience attending the rule, that it was agreed on all hands not to abide by it. That, accordingly, in the courſe of the trial it was not adhered to after the firſt day.

Upon this obſervation from the Chairman, the counſel for the ſitting members deſiſted from the objection. (2)

3. One

(1) *Supra*, vol. i. p. 88.

(1) *Vide infra*, Caſe of Worceſter, Note (A).

3. One John Triptree, a witneſs called on the part of the ſitting members, ſwore, That ſome days before the election, Mr. Jones aſked him for his vote, and ſaid, that if he would vote for him he would give him fifty guineas after the election. That, until he came to town in conſequence of the Speaker's warrant, he had never mentioned this circumſtance but to one Target, a perſon who had been a witneſs in the beginning of the cauſe, but who had died pending the trial, and before this evidence was given by Triptree. That ſince he had been in town, and before Target died, he had mentioned it to ſeveral perſons, of whom he named three.

The counſel for the ſitting members propoſed to call thoſe three perſons to corroborate what Triptree ſaid, of having mentioned the promiſe of the fifty guineas to them.

This was objected to.

It was ſaid, That it is an eſtabliſhed rule, that when a witneſs is examined in *chief* to any fact, you are not to call evidence to corroborate his teſtimony, unleſs the oppoſite party ſhall firſt bring evidence to impeach it. To prove how ſtrictly this rule is obſerved, a caſe was cited of *Halliday v. Sweeting*, which had been decided in the court of King's Bench about a week before (Michaelmas, 16 Geo. III.). That caſe was ſhortly this: Mr. Halliday, one of the members for Taunton, after the determination of laſt year in his favour (1) brought an action on the ſtatute of 2 Geo. II. cap. 24. againſt Sweeting, to recover the penalty of 500l. for having offered a bribe to one White. To prove the fact (at the aſſizes) White was called and ſwore to the offer. After he had been examined, his wife and ſiſter were called to prove, that, before the trial, he had told the ſame ſtory to them. An objection was made to the admiſſion of thoſe witneſſes, as no evidence had been produced to impeach the teſtimony of White. The plaintiff's counſel had preſumed his credit would be attacked, becauſe he had been contradicted on the trial of the Taunton election, before the Committee. The Judge of aſſize admitted the corroborating evidence; but, as he declared, with great reluctance; and, on a motion for a new trial, on the ground of its inadmiſſibility, the court granted the new trial.

The counſel for the ſitting member anſwered;

That

That the rule contended for, is not general; for that, in caſes of rapes, after the woman has given her evidence of the rape, it is the conſtant practice to admit her friends and relations, to prove her having told them of it about the time when it happened: They ſaid, that it was from candour they had propoſed, at that time, to call the witneſſes to corroborate the teſtimony of Triptree, in order that he might have no opportunity of communication with them before they ſhould give their evidence.

The counſel for the petitioners inſiſting on their objection, the point was given up on the part of the ſitting members.

4. James Corry being called, was rejected, becauſe he was one of the two perſons who had ſigned the petition on behalf of the electors. His inadmiſſibility was on all hands agreed upon. Similar inſtances have occurred before ſeveral other Committees, during this and the laſt ſeſſion.

5. One Charles Gillet was proved to have received ten guineas, in order to vote for the ſitting members; and it was admitted, on the part of the ſitting members, that, by this act, his vote was deſtroyed. But the counſel on that ſide having called him to give evidence, that he did not know the money to be Mr. Cuſt's or Mr. Innes's;

The counſel for the petitioners objected to his teſtimony, on the ground of its tending to exculpate himſelf.

The Committee over-ruled the objection.

In fact, however, he was never produced as a witneſs.

The Committee, after hearing the evidence of one James Rogers, and confronting him with ſome other witneſſes, having cleared the court, reſolved,

"That the Chairman do report to the Houſe, that "James Rogers, being called as a witneſs before the Com-"mittee, has groſsly prevaricated in giving his evi-"dence."

And, accordingly, on the ſame day, (Monday, 27 Nov. 1775,) agreeably to the 26th ſection of 10 Geo. III. cap. 16. the Chairman did report to that effect; and the Houſe being moved, that the entry in the Journal of the Houſe, of the 11th day of May, 1772, of the proceedings of the Houſe,

Houſe, in relation to Mary Hoſſe (1) might be read; and the ſame being read, the following orders were made:

Ordered, "That the ſaid James Rogers, having groſsly "prevaricated in giving his evidence before the Select "Committee, appointed to try and determine the merits "of the petition of Richard Brown, and Inigo William "Jones, Eſquires, and alſo, the petition of James Corry "and John Cox, on behalf of themſelves and others, be-"ing inhabitants, houſeholders, pariſhioners, and others, "within the borough of Ivelcheſter, in the county of "Somerſet, ſeverally complaining of an undue election, "and return, for the ſaid borough, be, for his ſaid offence, "committed to his Majeſty's gaol of Newgate."

Ordered, "That Mr. Speaker do iſſue his warrant ac-"cordingly (2)."

On Friday the 1ſt of December following, the Chairman preſented to the Houſe, in conſequence of a motion for that purpoſe, a petition of Rogers, ſetting forth, "That he "was extremely ſorry for having incurred the diſpleaſure of "the Houſe, by prevaricating in his evidence before the "Committee; that he was ſenſible of his great offence, "and of the juſtice of the Houſe; and hoping, as his far-"ther confinement would be prejudicial to his health, that "the Houſe would order him to be releaſed (3)."

On this petition it was ordered,

That he ſhould be brought to the bar of the Houſe, on the Monday morning following, in order to his being diſcharged, and that the Speaker ſhould iſſue his warrant accordingly (4).

On Monday, the 4th of December, he was, according to order, brought to the bar; where he received a reprimand from the Speaker, and was ordered to be diſcharged out of cuſtody, paying his fees (5).

During the whole courſe of his cauſe, the Committee made it a rule, to order the clerk to read over to every witneſs, the minutes of his evidence, that he might ſet right any miſtakes made in taking it down.

They

(1) *Supra*, vol. i. p. 45.
(2) Votes, p. 127, 128.
(3) Votes, p. 149.
(4) *Ibid.*
(5) Votes, p. 153.

They alſo made it a rule, where one witneſs directly contradicted what another had ſworn, to call in ſuch other witneſs, and confront them together.

On Monday, the 4th of December, the Committee, by their Chairman, informed the Houſe, that they had determined,

That none of the four candidates were duly elected.

And that the laſt election, for the borough of Ivelcheſter, was a void election (1).

On which a warrant for a new writ was immediately ordered (2).

(1) Votes, p. 153.
(2) *Ibid.*

XXIX.

THE CASE OF THE BOROUGH OF CARDIGAN.

And its CONTRIBUTORY BOROUGHS, IN THE COUNTY OF CARDIGAN.

The Committee was chosen on Tuesday, the 28th of November, and consisted of the following Gentlemen:

John Ord, Esq; Chairman,	Members for	Midhurst.
Matthew Wyldbore, Esq;		Peterborough.
Hon. Charles Finch,		Castle Rising.
James Worsley, Esq;		Yarmouth, Hants.
Anthony Bacon, Esq;		Aylesbury.
Sir George Howard, K. B.		Stamford.
Charles Dundas, Esq;		Richmond
Abel Smith, Esq;		Aldborough, Yorksh.
Sir John Goodricke, Bart.		Pontefract.
Thomas Lister, Esq;		Clitheroe.
Jervoise Clarke, Esq;		Yarmouth, Hants.
Sir George Robinson, Bart.		Northampton.
George Pitt, jun. Esq;		Dorsetshire.

NOMINEES.

Of the Petitioners.

Robert Henley Ongley, Esq; — Bedfordshire.

Of the Sitting Member.

Bamber Gascoigne, Esq; — Truro.

PETITIONERS.

Thomas Johnes, the Younger, Esq;

Several Burgesses of the Boroughs of Cardigan, Aberistwyth, and Lampeter, on Behalf of themselves, and other legal Burgesses of the said Boroughs.

Sitting Member.

Sir Robert Smyth, Baronet.

COUNSEL.

For the Petitioners.

Mr. Mansfield, Mr. Lee,

For the Sitting Member.

Mr. Kenyon, Mr. Graham.

THE

THE CASE

OF THE BOROUGH OF CARDIGAN,

And its CONTRIBUTORY BOROUGHS.

ON Wedneſday, the 29th of November, the Committee being met, the two petitions were read. They were both nearly in the ſame words, and ſet forth; That, at the late election, when Mr. Johnes and Sir Robert Smyth were candidates, the former had a majority of legal votes upon the poll; That Thomas Colby, Eſq; the returning officer, permitted a great number of perſons to poll for Sir Robert Smyth, who had no legal right to vote, and rejected the votes of divers others duly qualified, who offered to poll for Mr. Johnes; and was guilty of many other notorious acts of partiality and injuſtice (1).

The laſt determination of the right of election being next read, appeared to be as follows:

7 May, 1730. Reſolved, "That the right of election of "a burgeſs, to ſerve in Parliament for the town of Cardi-"gan in the county of Cardigan, is in the burgeſſes at "large of the boroughs of Cardigan, Aberyſtwyth, Lam-"peter, and Atpar, only." (2)

Then the ſtanding order of 16 Jan. 1735-6 was read. (3)

(1) Votes, 31 Oct. 1775, p. 28.
(2) Journ. vol. xxi. p. 574. col. 1.
(3) *Supra*, vol. i. p. 51.

The following circumſtances relative to the conſtitution of the different boroughs, (which were in part proved in the courſe of the cauſe, and have in part been collected from the information of thoſe who are in a ſituation to be beſt acquainted with them,) are premiſed to what is properly the hiſtory of the caſe, in order to render more intelligible the ſeveral points that occurred, and were argued and determined on the trial.

CARDIGAN, the *mother* borough, where the election is holden, and to which the others are ſaid to be contributory, is a borough by preſcription. Its preſent conſtitution depends either on preſcription, or charters granted at different times, and under different reigns. Of thoſe charters there is one of the 14th Hen. III. granting an exemption to the burgeſſes of Cardigan from tolls, paſſage, and pontage; one of the 34 Hen. III.; one of the 13 Edw. I.; one of the 15 Ric. II.; one bearing date 22d of September, in the 19 Ric. II. and confirmed in Parliament in the 1ſt Hen. VIII.; and two of Hen. VIII. the firſt bearing date the 12th of May, in the 4th year, the other, dated the 24th October, in the 19th year, of his reign.

By the laſt mentioned, among other things, the King grants,

"That the burgeſſes, and their ſucceſſors, for ever, "ſhall of themſelves chuſe one mayor and two bailiffs, on "Monday next after the feaſt of St. Michael, who ſhall "do and exerciſe that which belongeth to the offices of "mayor and bailiffs, within the town of Cardigan, and "borough of the ſame, having firſt been ſworn before the "chamberlain of South-Wales, or his lieutenants, faithfully to perform thoſe offices."

No records, or entries of the proceedings, of the borough have been preſerved, of a date prior to the time of Charles I.

There are two courts holden before the mayor. One, the *town-court*, for the trial of civil actions. This court uſed to be kept on every Monday fortnight, throughout the year; but it has been neglected for ſome years, and no buſineſs done at it. The other is the *court leet*, for the town and liberties of Cardigan. This is holden twice a year; *viz.* on the firſt Monday after Michaelmas, when the mayor and bailiffs are choſen, according to the charter; and on the firſt or ſecond Monday in May.

At

At the court leet, the mayor acts as ſteward, and a jury of burgeſſes is ſworn to enquire into, and preſent, all matters belonging to the corporation, and all manerial rights. New burgeſſes are, properly ſpeaking, elected by this jury; for they preſent ſuch perſons as they think fit to be made free of the borough, the form of preſentment being, "We "preſent J. F. of ———, in the county of ———, "yeoman, (or Eſquire, &c.) to be a burgeſs for the town "and borough of Cardigan, in the county of Cardigan;" and the perſon ſo preſented may come at any future time and take the oath of a burgeſs, which is adminiſtered by the town-clerk in the preſence of the mayor. No previous title is neceſſary in order to be made a burgeſs. It appears to be the uſage to adjourn the court leet for the purpoſe of preſenting burgeſſes for weeks or months, without obſerving any particular days for holding it in conſequence of ſuch adjournment.

Till the year 1765, when the laſt general ſtamp-act (1) was made, the names of the burgeſſes preſented and ſworn were entered or enrolled in the court-leet book; and, from the eſtabliſhment of the ſtamp laws till the alteration made in them by that ſtatute, each burgeſs ſo preſented and ſworn, had a docket of his admiſſion, written on a ſlip of ſtamped parchment, and ſigned by the mayor and town-clerk, delivered to him. Since 1765, in conſequence of the change then introduced in the law on this ſubject, a ſtamped book has been kept, in which the town-clerk, at his leiſure, enters the names of the new burgeſſes. This is called regiſtering or enrolling.

In the entries of the old preſentments before 1765, oppoſite to the names of the perſons ſworn, is written "*Jur.*" or "S." *i. e.* "*ſworn*," and after ſome names "A. *and* S." which ſome of the witneſſes examined before the Committee explained to mean, "*appeared and ſworn.*" Sometimes "R" is written after a name, which is ſaid to mean "*rejected* or *refuſed**," though in the more modern preſentments it means "*regiſtered.*" When there is no ſpecial date annexed to the mark ſignifying that a burgeſs has been ſworn, it is preſumed that he was preſented and ſworn at the ſame time. In caſes where he has been preſented at one court,

(1) 5 Geo. III. cap. 46. *Supra*, vol. ii. p. 77, to 78.

* *Quer.* If a perſon, after he is preſented, can be rejected?

court, and ſworn at a ſubſequent one, the date of the ſwearing is annexed.

For example,

" Preſented, 3 Oct. 1720.
" Tho. John, *jun.* *Jur.*
" Evan Jenkin, R.
" John ap John, R.
" William Jones, { *Jur.* 10 Aug. 1723."

In the year 1653, a Common Council, which was no part of the ancient conſtitution, was eſtabliſhed in the following manner. At the court leet held on the 9th of May in that year, the jury preſented, That it was neceſſary that a council of Twelve, being *aldermen**, and ſufficient burgeſſes of the ſaid town, ſhould be added to the mayor for the time being, to adviſe him for the good of the corporation. Twelve perſons were accordingly named in the ſame preſentment, and were the firſt Common Council; and vacancies by death or otherwiſe, have ever ſince been preſented by the jury, and filled up from time to time by the majority of the ſurvivors. The proceedings of this Council are entered in a book called the Council-book, which will be mentioned afterwards.

ABERISTWYTH is a borough by preſcription; is governed by a mayor and two ſerjeants; and has a court leet holden twice a year, where burgeſſes are made in like manner as at Cardigan, the mayor being the preſiding officer of the court.

LAMPETER is alſo a borough by preſcription, governed by a port-reeve and two ſtewards. The port-reeve preſides in the court leet, and burgeſſes are preſented and ſworn as at Cardigan.

The borough of ATPAR is likewiſe preſcriptive. The chief officers are a port-reeve and two bailiffs, and the method of creating burgeſſes the ſame as in the other three boroughs. In 1741 judgment of ouſter having been obtained againſt the port-reeve of that year, there has been none choſen ſince, nor any corporate act done in the borough. The members of the corporation are now ſaid to be reduced to two burgeſſes†; and even they, when they came to poll at the laſt election, could not, or, at leaſt, did not,

* *Quær.* What conſtitutes an Alderman in this borough?
† *Quære.*

not, produce any ſtamped entry or docket of their admiſſion.

As no particular qualification is neceſſary in order to be choſen a burgeſs of any of theſe boroughs, and as all burgeſſes, whether reſident or not, have a right to vote, it has been uſual, previous to an election, to admit great numbers. Above 4000 were admitted at Cardigan alone between the beginning of the year 1774 and the laſt election, which was in October of the ſame year. Their votes, however, were not good on that occaſion, as they had been admitted within the year.

The election began on the 20th of October. Among ſeveral rules laid down and followed by the mayor, during the courſe of the poll, one was, "That he would admit "every perſon to poll who would *ſay* he was a burgeſs of "one of the four boroughs, and had polled at a former "election." Mr. Johnes's managers objected to this rule, and inſiſted, that none ſhould be allowed to vote who did not produce entries of their admiſſions on ſtamps if admitted burgeſſes ſince 1765, or ſtamped dockets of their admiſſions, if made free prior to that time. The mayor, however, adhered to the rule, and only demanded to ſee the ſtamped admiſſion of ſuch as had never polled before. The corporation-books of Cardigan, Aberiſtwyth, and Lampeter, were on the table, and when a reference to the books was demanded on the part of Johnes, the managers, on the other ſide, ſaid, "There are the books, you may "look at them;" to which they replied, that it was incumbent on the voter to prove his title. After this ſort of diſpute, the mayor admitted the vote, if for Sir Robert Smyth, without any reference to the books.

By ſtat. 3 Geo. III. cap. 15. § 4. "The corporation-"books ſhall be referred to at the election, in caſe any "diſpute ſhall ariſe touching the right of any perſon to "give his vote thereat." The admiſſions of all thoſe who voted for Johnes, were produced before they polled; and both the mayor, and the managers for Sir Robert Smyth, often examined the entries and admiſſions, and put queſtions to Johnes's voters concerning their being the identical perſons whoſe names appeared in the books. Of thoſe whoſe votes were received for the ſitting member, about 249 declared at the poll that they had no admiſſions

to

to produce. About 134 ſaid, they *never* had any admiſſions.

On the morning of the election, at the mayor's lodgings, before the poll began, Mr. Penoyre Watkins, the principal manager for Johnes, having aſked the mayor what rules he meant to follow at the poll, Mr. Cuthbert, a gentleman who attended as counſel for Sir Robert Smyth, anſwered, in the mayor's preſence, "The legal right will be the mayor's "rule of conduct." On his aſking, What evidence he would require of the right of a burgeſs? Mr. Cuthbert anſwered, "What was done at the laſt poll will be legal "evidence of the right." It appeared, that at the election to which he referred, they had begun by requiring evidence of the admiſſion of the voters, but that all the parties had, afterwards, *agreed* (in order to ſhorten the duration of the poll, and prevent confuſion and a ſcarcity of proviſions, which were apprehended from the immenſe concourſe of people) to admit on the poll all who claimed a right to vote, and that there ſhould be a ſcrutiny after the poll. Afterwards, on ſome breach of the agreement during the courſe of the poll, the ſcrutiny did not take place.

Mr. Cuthbert, being examined as a witneſs, ſaid, That, on the morning of the election, during the converſation mentioned to have taken place at the mayor's lodgings, one of Johnes's agents aſked the mayor, If he would grant a ſcrutiny, if demanded? and that the mayor replied, "I "have no objection to it," and ſaid, he would grant it. He ſaid, he was ſure the queſtion was aſked by one of Johnes's agents. That he thought it was Mr. Penoyre Watkins; and that he (Mr. Cuthbert) always underſtood that the mayor had given a promiſe of granting a ſcrutiny. Mr. Watkins ſaid, in his evidence, that he recollected nothing of that ſort, and did not remember there had been any talk about a ſcrutiny.

Such was the principal and moſt eſſential part of the evidence concerning the conduct of the mayor, and the p rtiality charged upon him by the petitioners; in conſequence of which their counſel contended, that, as all who preſented themſelves for Sir Robert Smyth, ſay ng they were burgeſſes, and had polled at former elections, were received on their own aſſertion, without any evidence of their right, it now lay on the counſel for the ſitting member to produce evidence before the Committee, to eſtabliſh the

right,

right of all his voters; except thoſe, who, not having pretended that they had ever polled before, produced their admiſſion at the election. The number of thoſe laſt-mentioned was conſiderably under 100.

After ſome argument on this head on the firſt day of the trial, Sir Robert Smyth's counſel the next morning, without deſiring any reſolution or directions from the Committee on the ſubject, undertook to prove the right of his voters.

The numbers on the poll were,

For Sir Robert Smyth	1488
For Mr. Johnes	980
Majority for Sir Robert Smyth	508

In order to facilitate and ſhorten the buſineſs of the Committee, the agents on both ſides were directed to meet and examine the poll for Sir Robert Smyth, with the books of the corporation (A). This was done; and, in conſequence of their joint examination, it was *agreed* that, of the votes for the ſitting member,

I. A certain number was not to be found at all in the books.

II. That the names of a certain number were in the books, but that the deſcriptions added to thoſe names in the books, and on the poll, were not the ſame. For inſtance, on the poll, *Fol.* 71. N°. 19, was entered,

"Amaziah Owen of Landiſſilia, in the county of "Carmarthen—Burgeſs of Cardigan."

And the entry in the corporation-book which was fixed on by Sir Robert Smyth's counſel, as correſponding to the ſame perſon, was,

"Amaziah Owen, of the pariſh of *Cledey*, in the county "of Pembroke.—Admitted on ſtamps, regiſtered 26 Octo-"ber, 1774."

III. That a certain number were only found in a liſt written in the book called the council-book.

IV. That the admiſſions of a certain number were entered on ſtamps *during* the poll.

V. That the admiſſions of others were entered on ſtamps *after* the election.

VI. And of others within a year before the election.

VII. That the entries reſpecting a certain number in the corporation-book, and on the poll, agreed both in the names and deſcriptions.

I. Of

I. Of thoſe ſeven different claſſes of voters, the firſt was given up by the counſel for the ſitting member; and, concerning the others, queſtions aroſe, which were argued by the counſel, and ſeparately determined by the Committee.

II. With regard to the ſecond claſs, on the part of Sir Robert Smyth, it was inſiſted, That an entry of admiſſion in the corporation-books being produced, when the name was the ſame with that entered on the poll, this ought to be taken as *prima facie* evidence of the identity of the perſon, ſo as to throw the *onus* of proving the contrary on the petitioners; and that a difference of deſcription in the two entries, where the one deſcription was not repugnant to the other, was not ſufficient to deſtroy the preſumption that the perſon was the ſame. That, in a great many inſtances, the ſame perſon was deſcribed, in the books, by his tenement, and, on the poll, by his pariſh; and that, where the pariſhes or counties mentioned in the books did not correſpond with thoſe on the poll, ſtill there was no repugnance, becauſe many of the voters might have changed their places of abode between the time of their admiſſion and the laſt election.

The counſel for the petitioners, on the contrary, contended, That, though the difference of deſcription might not be ſuch as to be totally repugnant or irreconcileable, ſtill it ought to be conſidered as eſtabliſhing a preſumption that the perſons were different, ſufficient to render it neceſſary for the ſitting member to prove the contrary. That the names being the ſame could never be taken as evidence of the identity of the perſon, in Wales, where it is well known there are always great numbers of perſons of the ſame name, even in the ſame pariſh, and that there are not, perhaps, above a dozen of different names in a whole county.

After this point had been argued, the court was cleared, and when the counſel was called in again, they were informed by the Chairman, that the Committee had reſolved,

That the counſel for the petitioners ſhould make their objections to each individual vote; and that, when the deſcription in the books ſhould appear to differ from the deſcription on the poll, it was incumbent on the counſel for the ſitting member to remove the objections, ſo as to reconcile the difference.

III. The

III. The next queſtion was, Whether a liſt entered in the council-book of Cardigan, purporting to contain the names of burgeſſes whoſe preſentments had been loſt, ſhould be read as evidence of the right of perſons who had polled on the authority of that liſt.

Daniel Gwyn, the town-clerk of Cardigan being ſworn, produced the council-book, in which there is the following entry:

" Cardigan Town and Liberties 1 Oct. 1739.

" At a Common Council holden and kept in and for the " ſaid town and liberties, at the dwelling-houſe of John " Rees of the ſaid town, innkeeper, on Monday the firſt " day of October, 1739, before Thomas Davis, Eſq; " mayor, Thomas Pryſe, Eſq; common-council man, " Thomas Knolles, Eſq; alderman, James Lewis, Eſq; " alderman, William Parry, Eſq; alderman, Thomas " Lloyd, gent. alderman, Abel Griffith, gent. alder- " man, Pritchard Pryſe, gent. alderman, James Lloyd, " Eſq; common-council man, and John Lewis, Eſq; " alderman:"—

" It is likewiſe ordered, That Mr. Jacob Rice, town- " clerk of the ſaid town, do, with all convenient ſpeed, " examine and inſpect into the ſuits, rolls, preſent- " ments, and other records, of this borough, and do " thereout make and prepare a new ſuit-roll, containing " the names, additions, and places of abode, of the " burgeſſes of the ſaid town, and that he do take care to " omit thereout, all ſuch perſons as are dead; and that " the ſame or a true copy thereof, be afterwards entered in " this common-council book, for the better knowledge " and diſcovery of the burgeſſes, for the time to come; " and thereby to prevent any future impoſition upon the " mayor, aldermen, common-council men, and burgeſſes " of this corporation, by (1) perſonating other burgeſſes, " or otherwiſe howſoever."

Signed by the mayor and other perſons above recited.

In the ſame book, the liſt in queſtion is written, bearing date in 1741, with this title:

" A liſt of the burgeſſes of this town of Cardigan, in the " year 1741, alphabetically made, and herein entered, in " purſuance

(1) To make this ſenſe, or at leaſt grammar, it ſhould be, " *By perſons perſonating, (or pretending to be) burgeſſes.*"

" purſuance of an order for that purpoſe, made by the " mayor and council, upon Monday the firſt day of Octo- " ber 1739."

The liſt contains 1289 names, but only between 60 and 70 of Sir Robert Smyth's voters reſted the evidence of their right upon it. It is not ſigned by any one.

Daniel Gwyn was called, on the part of the ſitting member, and James Lloyd Eſq; of Maybus on the part of the petitioners, the one to eſtabliſh, the other to impeach, the credit and authority of the liſt.

Gwynn ſaid, he has been town-clerk of Cardigan ever ſince 1761. That he became acquainted with the corporation-books in 1756. There are no preſentments of burgeſſes to be found, from 1708 to 1756 except a few in 1727, and ſome in 1733, and 1734 (1); and no corporation-books from 1733 to 1756, except ſome court-rolls, and the council-book (2). The liſt has been in this book ever ſince it has been in his cuſtody, and has never been altered. The book was produced, and referred to, at a conteſted election of a mayor, in 1767. Does not remember that it was referred to or relied on, at that time, to ſettle any diſputed fact. Does not know by whom the liſt was written. There was a conteſted election for Cardigan in 1741.

Mr. Lloyd ſaid, He had the council-book in his cuſtody for years. That the liſt was written juſt before the election, in 1741, when there was a very warm conteſt between Mr. Pryſe and Mr. Lloyd, his (the witneſs's) father-in-law. His (the witneſs's) friends ſupported Mr. Pryſe. The liſt was written at the houſe of the witneſs's uncle, who was in the council, but not town-clerk, by George Haynes Jones, who acted as clerk to his uncle. He (the witneſs) aſſiſted, with one Davies, in reading over the names from ſome papers. Believes thoſe papers were old and new preſentments. Did not know where they were got from. They were in his uncle's poſſeſſion. Does not remember that Jacob Rice, who was town-clerk, was preſent at his uncle's when the liſt was made. A great number of names

(1) *Quære?* For a great many, bearing date in ſome of the intermediate years, were ſet forth in the brief for the petitioners.

(2) In the clerk's minutes, he ſays, " and an old book," but he clearly meant the council-book.

names were put in the liſt, of perſons who had been preſented, but had not been ſworn in. He ſpecified two. Some of thoſe on the liſt he knew not to be burgeſſes at this day, particularly William Edwardes, Eſq; member for Haverdfordweſt *. Believes that all the burgeſſes exiſting at the time, were put on the liſt. The liſt was made to ſerve Mr. Pryſe's intereſt. It is written on the wrong end of the book, and not ſigned, as all other entries are. He attended at the election in 1741, and the liſt was not then referred to in any one inſtance. There was a conteſted election of a mayor in 1767, and a diſpute, which of two candidates had the majority of legal votes, but the liſt was not referred to, either on that occaſion, or at the conteſted election for a member of Parliament in 1769. He attended at both.

At the time when the liſt was made, he was aged between 19 and 20. Was then totally unconnected and unacquainted with Lloyd the candidate, whoſe daughter he afterwards married. Was town-clerk of Cardigan, from 1742 to 1760. He ſupported Johnes at the laſt election, and attended there on his behalf. The book containing the liſt is not conſidered as a corporation book. The council is not an original or neceſſary part of the conſtitution of the borough. (☞Here he gave an account of the origin and nature of the council, agreeable to what has been ſtated in the beginning of the caſe.) The book, as a mere council-book, is authentic, but the liſt is not ſigned, as all other entries in the book are. In 1745, he produced all the book and papers of the corporation to the Houſe of Commons, in conſequence of the Speaker's warrant, but, having ſhown the council-book to the agents for both parties, they ſaid it was not evidence, and deſired him not to bring it up. Pryſe's agent (although the liſt had been written to ſerve that intereſt) told him not to bring it up, as not being evidence. He never knew the council-book referred to, at any election.

On his croſs examination, an affidavit of his was read, ſworn in the court of King's Bench, in 1767, in a cauſe which took its riſe from the conteſted election of a mayor in 1767. In that affidavit, the origin of the council is ſtated from the council-book, which he there refers to as authentic.

* Since created Lord Kenſington.

authentic. After mentioning the entry of 9 May, 1653, for the eſtabliſhment of a council (1), he ſays, in the affidavit, "And in purſuance of ſuch preſentment, it has "been *the conſtant cuſtom and uſage* of the ſaid town and "borough of Cardigan, &c."; and in another place, "He *conſtantly obſerved the ſaid cuſtom and uſage, as it* "*appeared to have been before uſed, by the ſaid council-* "*book.*" Theſe words were relied on, as repugnant to what he ſwore before the Committee, concerning the council-book, but, when compared with the account here given of his evidence, which I have taken from my own notes, and the minutes of the clerk, collated together, they appear perfectly conſiſtent.

The town clerk, on his examination, ſaid, It had been the uſual, though not the conſtant, practice, ſince he had been in his office, to adminiſter the oaths of allegiance and ſupremacy, to the burgeſſes when admitted, till 1774; when there was an order that it ſhould be dropt. He produced a liſt with thoſe two oaths written at the top, and, underneath, a great number of names ſubſcribed. Many of them, he ſaid, were there when he was made town-clerk. The names of the burgeſſes who had been admitted, and had taken the oaths, during his time, had been entered in this liſt, of which there was a continuation on another paper. He ſaid, he did not conſider theſe as corporation-papers, and therefore had not produced them at the election. They were now called for on the part of the ſitting member, with a view to corroborate the effect of the liſt in the council-book; but they were not examined or compared with it; and, in the argument, the counſel for the ſitting member did not mention them, nor endeavour to derive any advantage from them.

COUNSEL for the petitioners.

It follows clearly from the account which has been given of the liſt in the council-book, that it cannot poſſibly be received as evidence. It was not written in purſuance of the order of the council, for, by that order, it ought to have been made out by the town-clerk (2). It bears date two

(1) *Supra*, p. 86.

(1) *Vide* The Caſe of the King againſt Motherſell. Strange, p. 93.

two years after the order, and appears to have been privately prepared, on the eve of a conteſted election, by an agent of one of the candidates, at his houſe in the country. It refers to no record, or corporation-book. It contains names of perſons proved not to be burgeſſes, and, if examined, will be found to give a deſcription of perſons, not ſufficient to diſtinguiſh thoſe of the ſame name. Under the letter D, for example, there are no leſs than 19 David Thomas's. Under E, 9 Evan Jones's, and 8 or 10 Evan Griffiths's. There is no diſcrimination of any, except from their places of abode, and, as to a great number, even the place of abode is not mentioned. The book itſelf is not a corporation-book; and the liſt is not authenticated by any ſubſcription, and was never relied on at any election.

The admiſſion of ſuch a looſe entry of names, as evidence of the rights of burgeſſes, would tend to overturn one of the purpoſes of the ſtamp-laws; which was to eſtabliſh regular authentic inſtruments, or an authentic repoſitory, as the only way of ſecuring againſt fraud, in queſtions concerning perſons claiming the franchiſes of a corporation. Hitherto it has always been underſtood, that, ſince thoſe laws were enacted, the only method by which a man ought to be allowed to prove himſelf a burgeſs, is to produce a ſtamped docket of his admiſſion, if he was made free before 1765; or a ſtamped entry of ſuch admiſſion, if after that year. The only exceptions to this rule, are, either when it appears that, the claimant having been once poſſeſſed of ſuch ſtamped document, it has been deſtroyed, or loſt, without any fault of his; or when, having been entitled to this evidence of his admiſſion, he has been refuſed it by the fault of another.

COUNSEL for the ſitting member.

The Committee will lay out of the preſent queſtion any obſervations that have been made on the contents of the liſt, ſince it was irregular, and improper, to enter into particular remarks upon what it contains, before the court has determined whether it ſhall or ſhall not be read as evidence.

Although the liſt does not, in words, refer to any preſentments or books from which it was taken, yet it cannot be doubted but that it was made in conſequence of the order of October, 1739; and Mr. Lloyd has acknowledged

ed that it was copied from preſentments. It was made, therefore, by the order of the governing part of the corporation; and, though not written by the hand of the town-clerk, the preſentments from which it was taken muſt have been furniſhed by him. Hence he muſt be conſidered as having entruſted and employed Lloyd's uncle; and by the maxim of law, "*qui facit per alium, facit per ſe.*" Mr. Lloyd, indeed, has ſaid, that it was written to ſerve the purpoſe of an election, and that the names of perſons not burgeſſes were inſerted in it. But, at the ſame time, he owns that he himſelf was principally concerned in preparing it. What credit can be given to one who comes to prove criminality in a tranſaction in which he was himſelf a principal actor?

The liſt in queſtion is to be conſidered as a copy of the preſentments, and, as they are loſt, is now the beſt evidence of the rights of the perſons whoſe names are contained in it. It ought, therefore, to be admitted to be read as ſuch,—"Where," ſays Chief Baron Gilbert, in his Treatiſe upon Evidence, "a record is loſt, a copy of it may be read, "without ſwearing it a true copy; for the record is in the "cuſtody of the law, and not of the party, and therefore, "if loſt, there ought to be no injury ariſing to the party's "private right, and conſequently if it be loſt, the copy "muſt be admitted, without ſwearing any examination "concerning it, ſince there is nothing with which the copy "can be compared, and therefore it muſt be preſumed "true, without examination (1)."

If, after all, there ſhould be a doubt whether this liſt amounts to legal evidence of what it is offered to prove, the Committee will adopt a rule which is reaſonable and juſt in itſelf, and was laid down by Lord Hardwicke in a corporation cauſe that came on before him (2), *viz.* Where there are doubts concerning the relevancy of evidence, the court ought to hear it, and judge of the relevancy afterwards (B.)

In the reply, the counſel for the petitioners obſerved,

That, on the other ſide, they ſeemed to reſt the admiſſibility of the liſt as evidence chiefly on this ground, that Mr. Lloyd's teſtimony was not to be believed, but that Mr. Lloyd

(1) Gilb. Law of Evid. p. 22, 23.
(2) *Quære?*

Mr. Lloyd had ſaid nothing which was inconſiſtent or unbecoming a man of character and veracity. That there was no turpitude in the ſhare which he, when a young man of nineteen, had taken, by the directions of his uncle, in preparing the liſt, ſince it was not his province to enquire into the uſe it was intended for, nor could he be preſumed to be capable of judging at that time how far the fabrication of it was, or was not, culpable. That, in order to entitle the counſel for the ſitting member to conſider the liſt as a copy of legal documents which have been loſt, they ought to prove that ſuch documents once exiſted. That this had not been done. That it does not follow, becauſe there is, during a certain period, a chaſm in the books of the borough, that there once exiſted books correſponding to that period; and that, though Mr. Lloyd had ſaid that the liſt was taken from preſentments, it had not been ſhown that the perſons named in thoſe preſentments had been enrolled in the leet-books as ſworn and admitted.

The Committee, after clearing the court, and deliberating among themſelves, reſolved,

That the liſt of 1741, as entered in the council-book, was not admiſſible as evidence.

IV. and V. The queſtions concerning the 4th and 5th claſs of votes (1), were taken up, and argued, together.

The objection, with regard to the firſt of them, was principally founded on evidence of a ſuppoſed irregularity in the entries on ſtamps which were made during the poll, *viz.* That they were not made by the town-clerk; and that proper enquiries were not made touching the identity of the perſons, but that they were enrolled in the ſtamped corporation-book, and admitted to poll, if their names appeared in preſentments with the letter S. ſubjoined.

The Committee, however, determined the abſtract queſtion, and ſubjoined a qualification to their reſolution, in order to prevent any inference that they meant to tie up the counſel for the petitioners from calling in queſtion the right of perſons in the 4th claſs of voters, on the ground of their being in fact different people from thoſe whoſe names appeared on the preſentments.

(1) *Supra*, p. 90.

The reſolution and qualification, as delivered by the Chairman to the counſel, were as follow:

Reſolved, "That the voters whoſe admiſſions were "ſtamped during the poll prior to their voting, are to be "admitted as legal voters at this election."

"The parties are to underſtand that this reſolution goes "merely to the legality of the ſtamping the admiſſions dur- "ing the poll, before the voters had polled, and not to "any other right whatſoever (C)."

The counſel for the petitioner contended, on the 5th head,

That, by the acts of Parliament, a man cannot give the inſtrument of his admiſſion as a burgeſs in evidence, unleſs it be ſtamped, and that this being the beſt right, it muſt be proved that it has not been in his power to obtain it, otherwiſe no other evidence, of an inferior ſort, can be received. That, as the perſons whoſe admiſſions were entered on ſtamps after they polled, did not give, and could not have given, this beſt evidence to the mayor, he ought to have rejected their votes. That, if *he* could not legally receive them at the poll, it was now the duty of the *Committee* to reject them, ſince, with regard to the right of each individual voter objected to, they were ſitting in judgement on the very ſame cauſe which the mayor, as returning officer, decided upon at the election.

On the part of the ſitting member it was inſiſted,

That, where a ſtamp is required to authenticate any act, or inſtrument as evidence of ſuch act, at whatever time the ſtamp is added, it operates retroſpectively, and authenticates the inſtrument from the beginning: That, in caſes of admiſſion, as ſoon as the admiſſion is entered on ſtamps, the ſtamps confirm the pre-exiſting right, and ſubſtantiate every act of the burgeſs in the interval from his admiſſion. That, when an ejectment has been brought, and the plaintiff non-ſuited, becauſe the deed on which he founds his title was not ſtamped, on the trial of a new ejectment, if the deed has been ſtamped in the interval, it may be given in evidence, and will prove the title as accruing from the firſt date of the deed, not from the time of ſtamping. That, if an order of Juſtices has been made for removing a pauper, who claims his ſettlement under an indenture of apprenticeſhip, becauſe the indenture was not

ſtamped,

ſtamped, on an appeal, if it is ſtamped in the interval, the order will be quaſhed (1).

That there are many inſtances where, when two ſtamps are requiſite to a deed, and the deed has been offered in evidence having but one, the court has directed that it ſhould be ſent out to have the other added immediately, and then has received it in evidence. That, by the indemnification act of 14 Geo. III. cap. 47. § 3. the voters in queſtion, (though, at the time of being admitted, they neglected to enter their admiſſions on ſtamps,) having done ſo within the time limited in the ſtatute, were entitled to all the benefit and advantages accruing to them as freemen, in like manner as if their admiſſions had been ſtamped *ab initio*.

The ſection of the ſtatute referred to, was read, and is as follows (2).

" And whereas the appointments of divers clerks of the " peace, town-clerks, and other public officers, and the " admiſſions of divers members of cities, corporations " and borough-towns, or the entries of ſuch admiſſions in " the court-books, rolls, or records of ſuch cities, corpo- " rations, and borough-towns, which, by ſeveral acts of " Parliament, are required to be ſtamped, may not have " been provided, or the ſame not ſtamped, or may have " been loſt or miſlaid, Be it further enacted, That, for the " relief of ſuch perſons whoſe appointments or admiſſions, " or the entries of whoſe admiſſions, as aforeſaid, may not " have been provided, or not duly ſtamped, or where the " ſame have been loſt or miſlaid, it ſhall and may be law- " ful to and for ſuch perſons, on or before the 25th day of " December, one thouſand ſeven hundred and ſeventy five, " to provide, or cauſe to be provided, appointments and " admiſſions, or entries of admiſſions, as aforeſaid, duly " ſtamped, or, in ſuch caſes where ſuch appointments, ad- " miſſions, or entries of admiſſions, as aforeſaid, have " been made or provided, but have not been duly ſtamped, " to produce ſuch appointments, admiſſions, or entries of " admiſſion as aforeſaid, to the commiſſioners appointed " to inſpect and manage the revenues of the ſtamp-duties,

(1) *Quære?*

(2) It is printed in Mr. Pickering's *octavo* edition of the Statutes. In the 4to edition, nothing but the title is given, as a ſimilar act paſſes, I believe, annually.

" to be duly ſtamped; which ſuch commiſſioners are here-
" by authoriſed, empowered, and required to duly ſtamp,
" on payment of the duties firſt payable, or to have been
" paid on ſuch appointments, admiſſions, or entries of ad-
" miſſions as aforeſaid, without any fine or forfeiture
" thereon; and ſuch perſons ſo providing appointments, ad-
" miſſions, or entries of admiſſions as aforeſaid, duly
" ſtamped, or procuring the ſame to be duly ſtamped in
" manner aforeſaid, are and ſhall be hereby *confirmed* and
" qualified to act as clerk of the peace, town-clerk, or o-
" ther public officer, or member or members, officer or
" officers, of ſuch cities, corporations and borough-towns
" reſpectively, to all intents and purpoſes, and ſhall and may
" hold and enjoy, and execute ſuch office or offices, into
" which he or they has or have been elected, notwith-
" ſtanding his or their omiſſion, or the omiſſion of any of
" their predeceſſors, in ſuch cities, corporations, or bo-
" rough-towns, as aforeſaid; and ſhall be indemnified and
" diſcharged of and from all incapacities, diſabilities, for-
" feitures, penalties and damages by reaſon of any ſuch o-
" miſſion; and none of his or their acts ſhall be queſtioned
" or avoided by reaſon of the ſame."

The counſel for the petitioners in reply admitted,

That, where a ſtamp is required, when once the inſtrument is ſtamped, it authenticates and gives validity retroſpectively to acts done before the ſtamp was added. That, therefore, on a new election, the burgeſſes of Cardigan whoſe admiſſions were entered on ſtamps *after* the laſt poll, might give ſuch admiſſions in evidence to ſhew that their right had accrued *before* the laſt poll. But that, as they were not poſſeſſed of this legal evidence of their right at the laſt poll, the Committee, who were now trying whether they ought to have been admitted to vote on that occaſion, could not proceed on the ſuppoſition of their having been then poſſeſſed of ſuch evidence, and muſt therefore conſider them as not having been entitled to vote at that time. That the caſe of a ſecond ejectment is not ſimilar to the preſent, a ſecond ejectment being entirely a new cauſe, and like a ſecond election, where the parties, if they are become poſſeſſed of new evidence, may avail themſelves of it. That a new trial was never granted in an ejectment cauſe, becauſe a deed, which could not be produced on the firſt trial, as not being ſtamped, had been ſtamped ſince ſuch trial.

That,

That, in the caſe put of the removal of a pauper, the *original* trial of the cauſe, as to the pariſh appealing, is, in truth, at the ſeſſions, as the pariſh is not till then heard, and that, to be ſure, the firſt time ſuch pariſh is heard, they may avail themſelves of ſuch legal evidence as they are then poſſeſſed of, in the ſame manner as, in a trial in ejectment, a party may avail himſelf of a deed ſtamped after the action brought, but before the trial. That the caſe is the ſame when, a ſecond ſtamp being neceſſary, it is added before the deed is given in evidence. That thoſe caſes did not apply here, ſince the only queſtion before the Committee was, Whether certain voters received by the mayor, ought to have been ſo received *by him?* That, if they ought not, the Committee could not allow them as legal votes at the laſt election.

The Committee reſolved,

That perſons whoſe admiſſions were ſtamped after their votes were given, were not to be allowed as legal voters at the laſt election (D).

VI. The ſixth claſs of voters for the ſitting member were objected to, as falling within the diſqualification of the ſtatute of 3 Geo. III. called the Durham act. ☞ This objection, it ſhould ſeem, ought to have been made before the two queſtions immediately preceding, becauſe, if it had been determined in favour of the petitioners, the two foregoing queſtions could not have ariſen.

The words of the ſtatute are theſe:

" No perſon whatſoever claiming as a freeman to vote " at any election of members to ſerve in Parliament for " any city, town, port, or borough in England, Wales, " and the town of Berwick upon Tweed, where ſuch " voter's right of voting, is as a freeman only, ſhall be admitted to give his vote at ſuch election, unleſs ſuch perſon *ſhall have been admitted* to the freedom of ſuch city, " town, or borough, twelve calendar months before the " firſt day of ſuch election (E); and if any perſon ſhall " preſume to give his vote as a freeman at any election of " members to ſerve in Parliament, contrary to the true intent and meaning of this act, he ſhall, for every ſuch offence, forfeit and pay the ſum of one hundred pounds " to him, her, or them who ſhall inform or ſue for the " ſame; and the vote given by ſuch perſon ſhall be void " and of no effect.

" Provided always, that nothing herein contained ſhall " extend or be conſtrued to extend, to any perſon entitled " to his freedom by birth, marriage, or ſervitude, according " to the cuſtom or uſage of ſuch city, town, port, or bo- " rough (1)."

The counſel for the petitioners contended,

That the *admiſſion* meant by the ſtatute is the admiſſion upon ſtamps. That, till ſuch admiſſion on ſtamps, the party is to be conſidered as having only an inchoate right to his freedom, not as being a complete freeman; and that, as the titles of birth, marriage, or ſervitude, are the only inchoate rights excepted out of the diſqualifying clauſe, perſons entitled by any other ſort of inchoate right, as preſentment or election, are within the diſqualification. They ſaid, That, at leaſt, the words of the ſtatute are capable of this interpretation. That there could be no inconvenience, and there would be many advantages, from ſo conſtruing it. That perſons choſen burgeſſes have it in their power to complete their right by demanding to be admitted upon ſtamps as ſoon as they are choſen. That the legiſlature had two purpoſes in making the ſtamp laws; one, that the ſtamped inſtruments might be authentic documents of the matter contained in them; the other, to increaſe the public revenues by the ſtamp duties. That both thoſe ends would be in a great meaſure, fruſtrated as to admiſſions to the freedom of a borough, if it were to be holden that a man may be a complete burgeſs without any ſtamped admiſſion the inſtant before it becomes neceſſary for him to produce it as evidence of his right. That, if the law were to be ſo underſtood, burgeſſes would never think of having ſtamped admiſſions, unleſs they ſhould find them neceſſary for a ſudden occaſion, ſo that many would die without ever having been admitted upon ſtamps, by which means the revenue would be defrauded, and the legal evidence of ſuch perſons having been freemen would be loſt.

On the part of the ſitting member it was anſwered,

" That when a burgeſs is elected, or *preſented*, and then *ſworn in*, his right is complete. That the ſwearing in, is the ſort of admiſſion meant by the ſtatute. That, if the doctrine of the counſel for the petitioner were true, it would follow, that, before the ſtamp acts, there never had been

(1) 3 Geo. III. cap. 15. § 1.

been ſuch a thing as a complete right of freedom in a borough. That, from the words of the laſt ſtamp act, it is plain, that the admiſſion is conſidered as a thing diſtinct from, and previous to, the entry thereof upon ſtamps, The words are, "For every ſkin, &c. on which ſhall be "engroſſed, &c. in the court-book, roll, or record, of "any corporation or company, *any entry, minute, or me-*"*morandum* of any *admiſſion* into any corporation or com-"pany, the ſum of two ſhillings."

The Committee reſolved,

That it is not neceſſary, by the ſtatute of 3 Geo. III. for freemen, whoſe right in every other reſpect is complete a year before an election, to have their admiſſions entered on ſtamps twelve kalendar months before, in order to qualify them to vote at, ſuch election (D).

VII. As to the ſeventh claſs of voters for the ſitting member, although both the names and deſcriptions in the corporation-books agreed with thoſe on the poll, the counſel for the petitioners contended, That, as there are ſuch numbers of perſons of the ſame name in Wales, and, as Mr. Johnes's agents were not ſuffered to enquire into the identity of thoſe voters during the poll, it was now the buſineſs of the counſel for Sir Robert Smyth to prove their identity.

The Committee, however, reſolved,

That, as to this claſs of voters, the *onus* of diſproving the identity of the perſons lay upon the counſel for the petitioners.

In conſequence of the foregoing reſolutions of the Committee, liſts were prepared, by the agents on each ſide, of the number of votes which were diſqualified by ſuch of them as were in favour of the petitioners; and, (in conſequence of this ſort of ſcrutiny) the counſel for Sir Robert Smyth, on the ninth day of the trial, admitted, that, as the poll then ſtood, there was a majority of 58 in favour of Mr. Johnes.

Upon this, Smyth's counſel endeavoured by evidence to ſhow, That the conduct of Johnes's agents, before and during the election, had been ſuch, and that the poll had been ſo carried on, on his part, that there was the greateſt reaſon to believe, that thoſe perſons who had voted for him, in conſequence of ſtamped admiſſions in the books, were not the perſons who really had been admitted, but

that

that they were men who had falſely perſonated thoſe who were entitled under thoſe admiſſions: That his counſel, therefore, ought to be put upon identifying his votes, in the manner as the counſel for the ſitting member had been obliged to do.

The greateſt part of the voters for Mr. Johnes, were burgeſſes of Lampeter.

By the ſtatute of 3 Geo. III. cap. 15. it is enacted, "That the mayor, bailiff, town-clerk, or other officers, of "any corporation, having the cuſtody of, or power over, "the records of the ſame, ſhall, *upon the demand* of any "candidate, or his agent, or any two freemen, on the pay-"ment of one ſhilling, permit ſuch candidate, agent, or "freemen, between the hours of nine in the morning "and three in the afternoon, *at any time before*, and with-"in one month after, an election, to inſpect the books and "papers wherein the admiſſion of freemen ſhall be entered." A penalty of 100 l. is impoſed on the officers above ſpecified for every refuſal (1).

It appeared, That Mr. Lewis Rogers, an attorney, and agent for Sir Robert Smyth, went to Lampeter ſeveral times, between the 5th of October and the time of the election, to demand an inſpection of the corporation-books, of the port-reeve. That he never found him at home, and that he never enquired for *him* any where elſe. That he went to Mr. Adams's houſe, (who is lord of the manor of Lampeter,) to aſk for the books, thinking they might be there. That he there enquired for Mr. Adams's agent, (one Jenkins) and for David Davies, the town-clerk of Lampeter, and was told, they were not there. That he left his name, and the buſineſs he came upon, but not in writing. One Brookman, who had been butler to Mr. Adams in October, 1774, ſaid, That *he* went to the door when Rogers aſked for Jenkins, and that he refuſed him admittance. That both Mr. Adams and Jenkins had told him, that neither Jenkins, the town-clerk, nor the port-reeve, were to be ſeen by any body. That the port-reeve was often at Mr. Adams's houſe, in the month of October. That both Mr. Johnes and his father were there at different times, when the port-reeve was alſo there. That the gentlemen were generally in the ſame room together, and ſeldom went out: That they had ſtamped books before them, which

(1) § 4.

which they ſaid were the Lampeter books. That he had ſeen them writing in thoſe books, but could not ſay what they were writing. That Mr. Jenkins, the town-clerk, and the port-reeve, had all ſaid to him, that the whole election depended on *themſelves*, and the books, being kept ſecret.

It did not appear that the books had ever been demanded of the port-reeve, perſonally at his own houſe.

There were marks of raſures in many parts of thoſe Lampeter books, and it appeared, that, when objections were made to the identity of Mr. Johnes's voters, on the ground of a difference between the accounts they gave of themſelves, and the deſcriptions in the books, or becauſe of raſures in the entries of their admiſſions, his agents, particularly Mr. Watkins, anſwered, that *there could be no averment againſt a record*, and that parole evidence could not be received to contradict a record. This anſwer was often made during the courſe of the election; but Mr. Watkins, in his evidence, ſaid, that he had only made ſuch anſwer in caſes like the following, *viz.* where a voter declared that he had been admitted in April, and, by the entry of his admiſſion, it appeared to have been in May. Several witneſſes ſaid, That notwithſtanding, and after, thoſe anſwers by Mr. Johnes's agents, many queſtions were put to his voters both by his own agents, and thoſe of Sir Robert Smyth, to aſcertain their identity. That this point was ſtrictly ſcrutinized. That Sir Robert Smyth's people did not offer any evidence to diſprove the identity as eſtabliſhed by the examination of the voters themſelves. Mr. Watkins ſaid, he particularly recollected that ſeveral had been rejected, becauſe the parole account they gave, of the dates of their admiſſions, differed from the entries in the books; and none ſeemed to be received to poll, unleſs the mayor was ſatisfied of their right, nor until the ſitting member's agents, being aſked if they were ſatisfied, ſaid they were.

The Committee, after hearing the counſel on both ſides on this point, reſolved,

That, as the identity of Mr. Johnes's voters had been ſcrutinized at the poll, it was not incumbent on his counſel to identify them before the Committee (D).

After this laſt reſolution was declared, the counſel for the ſitting member acquainted the Committee, that they had nothing farther to offer. The poll therefore remained, according

cording to their admiſſion, with a majority of 58 in favour of Mr. Johnes.

The reader will have obſerved, that all the queſtions in this cauſe, except, thoſe concerning the conſtruction of the ſtamp laws, and of the Durham act, were mere general points of evidence. There were, beſides, two particular queſtions of evidence determined in the courſe of the cauſe.

1. Mr. Watkyns, having ſtated, in his evidence before the Committee, the arguments he had urged with the mayor againſt the rules laid down for the conduct of the poll, was going on to mention the anſwer made by Mr. Cuthbert, counſel for Sir Robert Smyth, to thoſe arguments.

This was objected to.

It was ſaid, that the arguments of counſel could not be evidence of the fact, and that the mayor could not be affected by what a gentleman who was counſel for one of the parties might have ſaid.

The counſel for the petitioners contended, That whatever a third perſon ſaid of the mayor in his preſence, was evidence of the mayor's conduct on that particular occaſion.

The Committee after deliberation, came to the following reſolution.

Reſolved, That the anſwers given by Mr. Cuthbert, to the arguments of Mr. Watkyns, are not admiſſible evidence.

2. When the Committee had determined, that the counſel for the ſitting members ſhould identify thoſe of his voters whoſe deſcription on the poll differed from that in the book, they were going to call Mr. Colby, the mayor, to prove the identity of one of thoſe voters.

On the part of the petitioners it was objected,

That Mr. Colby was criminally charged in the petitions. That the tendency of his evidence muſt be to acquit himſelf, and, conſequently, that he was not an admiſſible witneſs.

It was anſwered,

That nothing criminal had been proved againſt the mayor; for that it had appeared that, in conducting the poll, he had adopted the method which had been followed at the former election.

The

The Committee after deliberation, reſolved,

That the mayor could not be admitted to give evidence (1).

☞ Lewis Rogers was not admitted to give evidence, becauſe he had been in the room during the examination of other witneſſes, and could not ſay he was an agent on the trial of the cauſe.—The rule is always made with an exception as to agents.

On Thurſday, the 7th of December, the Committee, by their Chairman, informed the Houſe that they had determined,

That Thomas Johnes, the younger, Eſq; was duly elected, and ought to have been returned (2).

(1) *Vide infra*, Caſe of Worceſter.
(2) Votes, p. 166, 167.

NOTES

NOTES

ON THE CASE OF

CARDIGAN.

PAGE 89. (A.) The great loſs of time, and the confuſion, occaſioned by the ignorance in which the parties were, till the cauſe came on, with regard to the different heads of objection made by the oppoſite ſide, and the numbers of voters objected to under each head, were ſenſibly felt in this caſe, and in the following caſe of Worceſter. An eaſy remedy might be provided. By extending the reſolution mentioned in the Introduction, vol. i. p. 16. No. v. to boroughs, or by making another ſimilar reſolution with regard to them, all the ſcrutiny and examination, which, being now carried on by the agents on each ſide during the trial, clogs and retards the proceedings of Committees in caſes where the voters are numerous and the objections various, would be anticipated. The parties would come prepared with the exact knowledge of what they meant to admit, and what remained to be litigated.

The enormous length of time which the Worceſter cauſe employed, and which I fear may beget, in ſome, a reluctance to take the chance of ſerving on Committees, when the caſes are thought to be of the ſame ſort, has ſatisfied ſeveral members of Parliament of the expediency of what I now propoſe. I believe it has been mentioned in the Houſe that ſuch an amendment of the former reſolution, or ſuch new reſolution, will be moved.—As, in all boroughs where honorary and non-reſident freemen vote, the voters *may*, and in ſome, I believe, already *do*, exceed, in number, thoſe of any ſhire, it is obvious, that the reaſons which gave riſe to the rule reſpecting counties, are equally ſtrong with regard to ſuch boroughs.

P. 96. (B). The rules concerning the admiſſibility of evidence have been eſtabliſhed chiefly with a view to thoſe tribunals, where the departments of trying the facts of cauſes, and of expounding, and deciding upon, the law, are entruſted to different perſons. When thoſe two provinces centre in the ſame judges, as in Election Committees, the ſame ſtrictneſs hardly

ſeems

ſeems to be neceſſary. Suppoſe a queſtion upon the admiſſibility of evidence is raiſed before a Committee, and they are required to decide upon it, their duty then is, to determine, in the character of judges of the law, whether it is proper to lay the evidence offered, and objected to, before themſelves, in their other capacity, of jurymen. Now, in truth, almoſt all the inconvenience which may be apprehended from an improper impreſſion, and prejudice, occaſioned by illegal evidence, is, in in ſuch caſe, already incurred, by its being ſtated as what is to be proved, before it is actually produced, and ſworn to, in the regular form. There is another reaſon why it is not, perhaps, eſſential to be ſo ſcrupulous in the caſe of Committees, as with regard to common juries. The law ſuppoſes Committees to be acquainted with the nature of legal evidence, and therefore it muſt be preſumed, that, if they do admit evidence which, when they hear it, turns out to be illegal, they will lay no ſtreſs upon it in forming their verdict. Juries, on the contrary, by intendment of law, are conſidered as *unacquainted* with the nature of legal evidence.

It has often occurred to me, that, in trials at *niſi prius*, when evidence is objected to, there is an impropriety in allowing the counſel who offers it, to ſtate what he means to prove in the hearing of the jury, and this for the reaſon already mentioned; eſpecially as jurymen are too apt to infer, that evidence ſo offered muſt be both true, and fatal to the party who objects to it, merely becauſe it is objected to. Perhaps it would be an improvement, when queſtions of admiſſibility are raiſed, that the jury, as well as the witneſſes, ſhould withdraw, till the point is argued and decided.

P. 98. (C). The meaning of the reſolution, coupled with the explanation, is ſufficiently clear; but it might perhaps have been more accurately expreſſed in one reſolution. Thus;

Reſolved, "That perſons, whoſe admiſſions were entered on "ſtamps *before* they voted, but *after* the poll began, were not, "*on that account*, diſqualified from voting at the laſt election."

P. 101, 103, 105, (D). I have ventured to throw theſe three reſolutions into a more accurate and technical form, than that in which they were delivered: but, in order to be ſure, that I had not miſtaken their meaning, I was not ſatisfied with gathering it from the conduct of the parties, and the Committee, in conſequence of the reſolutions; I talked the matter over ſeveral times, both with the Chairman, and the counſel on both ſides. To convince the reader of the propriety of what I have done, it will be ſufficient to ſtate the words of one of the reſolutions, as communicated to the counſel, and entered in the minutes;—of *that*, for example, relative to the ſixth claſs of voters. (*ſupra*, p. 103.)

Reſolved,

Reſolved, " That [perſons whoſe*] admiſſions [were] " ſtamped within twelve kalendar months before the election, " are legal voters, within the meaning of the act of 3 Geo. III."

Now it could never be the meaning of the Committee that ſuch perſons were legal voters whatever other defects there might be in their titles, yet the words certainly expreſs that propoſition. A qualification like that added to the reſolution concerning the fourth claſs *(ſupra*, p. 98.) was *underſtood* to be tacitly annexed to this.—The inaccuracy aroſe in a manner very natural. It was firſt propoſed (after the counſel had withdrawn) to put the queſtion in the negative, thus, " Reſolved, That, &c. are *not* legal voters." This, in point of form, would have been proper; but, when it appeared that the majority of the Committee were for over-ruling the objection, inſtead of new framing the queſtion, it was only altered, by ſtriking out the word " *not*."

P. 101 (P). It is no wonder that a want of preciſion ſhould ſometimes be obſervable in the manner of wording *reſolutions* of Committees, for they are often made without premeditation, and, if the meaning of the court is ſufficiently underſtood, it is not of much importance to the *particular cauſe* (though it is of importance, if the reſolution is to be of authority, in *ſubſequent caſes)* that it ſhould be expreſſed with a critical nicety. Inaccuracies in *ſtatutes* are not ſo pardonable; yet, they are too com. mon. The following is one of many inſtances which might be produced.

By the ſtatute of 18 Geo. II. cap. 18. the freeholder's oath now in uſe was introduced.—By that oath, which every voter at a county election is obliged to take, if required by a candidate or any other voter, he is to ſwear that he has been in the actual poſſeſſion or receipt of the rents and profits of his freehold *above twelve kalendar months*; (unleſs it came to him in ſome of the ways there ſpecified). By ſect. 5. it is enacted, in like manner, that no perſon ſhall vote, without having been in actual poſſeſſion, &c. *above twelve kalendar months*; (unleſs he is within ſome of the exceptions. There is a ſimilar oath and proviſion in the ſtat. of 19 Geo. II. cap. 28, relative to freeholders in counties corporate, and the words concerning the twelve kalendar months are exactly the ſame. Can any one clearly decide whether the twelve months are to be computed backwards, from the day when the particular voter polls, or from the day when the election commenced? The interpretation, according as it ſhould happen to be one way or the other, might, on many occaſions, decide entirely the merits of an election; for it may happen that many

* The words included between theſe marks [ ] are not in the entry in the minutes, but are abſolutely neceſſary to make the ſentence complete.

many perſons who have been freeholders only eleven months at the beginning of the poll, ſhall have been in poſſeſſion above twelve months at the time when they come to vote. The moſt obvious conſtruction is, that the computation is to be from the day when the voter takes the oath, and gives his vote. Yet we can hardly preſume that the legiſlature meant to draw *one* line with regard to occaſional freeholders in counties, and counties corporate, and *another* with regard to occaſional freemen in boroughs; and, by the clauſe of 3 Geo. III. cap. 15, cited in that part of the text to which this note refers, a freeman (who is not within the exceptions of the act) in order to be entitled to vote, muſt have been poſſeſſed of his franchiſe twelve kalendar months "before the *firſt day* of the election."

THE

XXX.

THE

CASE

Of the CITY of

WORCESTER,

In the County of WORCESTER.

On Friday the 26th of January, 1776, (which was the ſecond day of the meeting of the Houſe after the Chriſtmas holidays) the Committee for trying this cauſe was to have been balloted for, but, as there were not 100 members preſent, either on that day, or the day following, the Houſe adjourned, and the ballot did not take place till the Monday.

On Monday, the 29th of January, the Committee was choſen, and conſiſted of the following Gentlemen:

Sir Adam Ferguſon, Bart. Chairman,	Members for	Ayrſhire.
Sir Walden Hanmer, Bart.		Sudbury.
Francis Anneſley, Eſq;		Reading.
Matthew Wyldbore, Eſq;		Peterborough.
Abel Smith, Eſq;		Aldborough, Yorkſh.
Tho. Edwards Freeman, Eſq;		Steyning.
John Rogers, Eſq;		Weſt Loo.
John Rolle Walter, Eſq;		Exeter.
Thomas De Grey, jun. Eſq;		Tamworth.
George Medley, Eſq.		Seaford.
Cha. Warwick Bampfielde, Eſq;		Exeter.
John Tempeſt, Eſq;		Durham.
Richard Crofts, Eſq;		Cambridge Univ.
NOMINEES.		
Sir George Saville, Bart.		Yorkſhire.
Charles Melliſh, Eſq;		Pontefract.

PETITIONERS.

Sir Watkin Lewes, Knight,

Sitting Members

John Walſh, Eſq; Thomas Bates Rous, Eſq.

COUNSEL *for the Petitioners.*

Mr. Kenyon, Mr. Hardinge, and (in Mr. Kenyon's abſence) Mr. Arden.

For Mr. Walſh.

Mr. Mansfield, Mr. Serjeant Groſe, and (in Mr. Mansfield's abſence) Mr. Morris; and, afterwards, (in *his* abſence) Mr. Macdonald.

For Mr. Rous.

Mr. Lee. Mr. Cooper.

☞ The Petitioners counſel objected to the appearance of the two ſitting members as two diſtinct parties, by ſeparate counſel. This produced a debate in the Houſe, but it was allowed without a diviſion. *Vide ſupra*-, vol. i. p. 43, 44. (Note S.)

THE

THE

CASE

Of the CITY of

WORCESTER.

ON Tueſday the 30th of January, the Committee met, and the petition was read. It ſet forth;

1. That the two ſitting members had been guilty of bribery, by themſelves and agents.

2. That the mayor and ſeveral aldermen, and Juſtices of the city, and many of the common council, had acted as agents of, and had threatened, canvaſſed, and ſolicited great numbers of freemen to vote for, the ſitting members, and had promiſed that they ſhould be ſet down as conſtables, and have a certain reward for their votes; that they had bribed and attempted to bribe with money, and otherwiſe corrupt, a great many freemen, to induce them to vote for Mr. Walſh and Mr. Rous, or one of them; and were guilty of divers other corrupt and illegal practices for the ſame purpoſe.

3. That by thoſe means, and other undue influence, the mayor, aldermen, and common council, as agents for the ſitting members, procured many to vote for them, who otherwiſe would have voted for the petitioner.

4. That the mayor, ſeveral of the aldermen, and Juſtices, and the town-clerk, for ſeveral days before, and during the election, had met together, and had appointed and ſworn in, many freemen (to the number as the petitioner believed, of 300 and upwards,) to be conſtables, under a promiſe from thoſe perſons, that they would vote for Mr. Walſh and Mr.

Rous, for which they were to have certain rewards in money; and that this money was afterwards paid to them out of the funds of the city, or by the two ſitting members.

5. That a peer and lord of Parliament had by himſelf and his agents, interfered in the election, by publicly canvaſſing and ſoliciting votes on behalf of Mr. Walſh, and by uſing threats to intimidate freemen from voting for the petitioner, in violation of the privileges of the Houſe, and the freedom of election, and to the infringement of the rights of the Commons of Great Britain.

6. That the ſheriff and returning officer of the city (Worceſter being a county corporate, and the ſheriff the returning officer) had rejected good votes tendered for the petitioner; and had admitted perſons not qualified, to vote for the ſitting members.

7. That, by theſe and other illegal means, the ſitting members had procured a majority on the poll; but that the majority of legal votes was in favour of the petitioner (1).

The laſt determination of the right of election was next read; and then the ſtanding order of 16 Jan. 1775-6 (1).

The laſt determination is as follows:

11 Feb. 1747-8. Reſolved, "That the right of election of citizens to ſerve in Parliament for the city of "Worceſter, is in the citizens of the ſaid city not receiving "alms, and admitted to their freedom, by birth or ſervitude, or by redemption, in order to trade within the ſaid "city (2).

The election began on Wedneſday, the 12th of October, 1774, and ended on Tueſday, the 18th.

The numbers on the poll were,

For Mr. Rous	981
Mr. Walſh	893
Sir Watkin Lewes	736
Mr. Bearcroft	312

So that Mr. Rous had a majority of 245, and Mr. Walſh of 157, over Sir Watkin Lewes.

The

(1) Votes, 31 Oct. 1775. p. 31, 32.
(2) *Supra*, vol. i. p. 51.
(3) Journ. vol. xxv. p. 510. col. 1.

The objects of the petitioner were;

I. To prove that bribery had been committed by the ſitting members, or their agents; and thereby to make the election void as to them.

II. To diſqualify ſuch a number of the voters for the ſitting members, and to add ſuch a number to the poll for the petitioner, as to leave a majority in his favour, and entitle him to be declared duly elected.

III. To induce the Committee to make a ſpecial report to the Houſe of the various matters particularly alledged in the petition, againſt the ſitting members, the corporation, the returning officer, the peer whoſe influence was complained of, and the corrupted voters.

1ſt Head.] On the firſt head witneſſes were produced, who ſwore to poſitive acts of bribery and promiſes, by Mr. Walſh himſelf, and by his agents. There was no attempt to charge Mr. Rous *directly*; but it was contended, that Mr. Walſh and his agents were to be conſidered as agents for Mr. Rous, who, therefore, muſt be affected by what they had done.

2d Head.] On the ſecond head there were the following objections, to different claſſes of voters for the ſitting members.

1. To a great number, That their votes had been procured by money or promiſes. This was the main point of the caſe, being ſufficient, if proved to the full extent, to have given the petitioner a majority over both the ſitting members.

By a charter of James I. the city of Worceſter, which was before that time, and continues to be, a county of itſelf, is incorporated by the name of the mayor, aldermen, and citizens of the city of Worceſter. There is a common-council compoſed of two bodies, one of twenty-four the other of forty-eight, making together ſeventy-two common-council men. The number of citizens is indefinite. The mayor and ſix aldermen are choſen annually out of the twenty-four, by the ſeventy-two. Thoſe ſix aldermen, and the mayor, are, by their offices, the Juſtices of the peace for the city.

The day before the election began, the common council, greater part of whom were in the intereſt of the ſitting members, made the following reſolution and order:

11 Oct. 1774. Reſolved, " That it be recommended " to the mayor and Juſtices to appoint ſuch a number of " conſtables as they ſhall judge proper, to preſerve the peace, " during the election of members to repreſent this city in " Parliament."

Ordered, " That the expences attending ſuch appoint- " ment be defrayed by this corporation."

Accordingly, about three hundred were ſworn in, and they received one ſhilling and ſix-pence a day from the chamberlain, out of the money of the corporation, for a week. All the conſtables, except about ten or twelve were freemen; and voted for the ſitting members. At former elections it had been uſual to appoint a certain number of ſpecial conſtables to keep the peace; but they were not ſo numerous as at this election, and they were paid in equal proportions by the candidates, and not by the corporation. There were ſeveral of the perſons appointed on the preſent occaſion lame, or ſo infirm as to be incapable of doing the duty of the office; inſomuch that, a riot having happened during the courſe of the poll, it was thought neceſſary to ſwear in about ten or twelve able-bodied watermen. Theſe watermen were the only conſtables who were not freemen.

From the circumſtances juſt ſtated, it was contended; That the appointment of ſo many freemen to be conſtables, was only colourable. That, being all voters, and having voted for the ſitting members, the money paid to them was to be conſidered as bribes given them by the corporation, who were the agents of Walſh and Rous. That all the votes of the conſtables, therefore, ought to be ſtruck off the poll.

Beſides this, there were witneſſes who ſaid, that two agents of Walſh, in their preſence, had offered, on the 30th of September, to a company of about 25 freemen, to make them conſtables if they would vote for Walſh and Rous, and ſaid they ſhould have a guinea from each candidate; and that many of them accepted on that condition. One of the witneſſes ſaid, that he aſked whether he might not be half a conſtable if he polled for Walſh, and that he was told he could not be a conſtable unleſs he would vote for both. Several perſons ſwore to declarations of voters who were made conſtables, that they had received money from,

from, or on the behalf of, Walſh, and that they were promiſed more.

There was a conſiderable number of out-voters, reſident at London, Birmingham, Kidderminſter, and other places, whoſe expences were defrayed by the ſitting members. It was alſo ſworn, that they were promiſed money for their trouble, by the agents. Many declared that they had voted in the *expectation* of a reward. Some, that they had received the money, after they had polled.

2. Another objection was, That a great number of the voters for Walſh and Rous did not appear to be enrolled in the corporation-books. When the counſel came to this part of the caſe, as there had been no previous examination of the books by the agents on both ſides, (1) the Committee directed, that the books ſhould be delivered to the agents for the petitioner, for the purpoſe of ſearching them; and that they ſhould report to the Committee, on the day following the reſult of ſuch ſearch. Accordingly, Lord Mahon, (who appeared as a friend of the petitioner) attended by ſeven or eight clerks, ſat up all night, comparing the liſt of the voters for Walſh and Rous with the corporation-books; and he, as well as the clerks who had been employed with him, gave an account, next morning, of the method they had purſued, and that they had diſcovered, that there were 114 perſons on the poll for the ſitting members whoſe names were not to be found in any of the corporation-books; beſides 39 who were deſcribed differently, in the books, and on the poll, as to their profeſſion, The manner in which they had examined the books was this: An alphabetical liſt of all the voters for the ſitting members was ſubdivided into ſix ſmaller liſts. The names beginning with the letters A. B. and C. being contained in one, were delivered to one clerk, thoſe beginning with D. E. F. G. to another, and ſo on. Then a perſon, aſſiſted by Lord Mahon, read over all entries in the books, from the beginning to the end. Whenever he came to the name of any perſon which was contained in one of the liſts, the clerk who had that liſt, ſtruck his pen through the name. Having gone through the whole in this way, there remained 114 names in their different liſts which were not ſtruck out, and which therefore,

(1) *Vide ſupra*, p. 108. Caſe of Cardigan, Note (A).

therefore, they had not found entered in the books. Afterwards, however, on re-examination of the books by the agents on both ſides, the number of perſons not enrolled was reduced, firſt to 61, and then to 19. The 19 were given up by the counſel for the ſitting members.

It appeared, that there had been great irregularity with regard to the enrolment of freemen. Before the ſtatute of 5 Geo. III. (1) it had been the practice to enrol the freemen on a ſtamped book, not to give them ſtamped dockets of their admiſſions, as in other boroughs. But they received on their admiſſion what they call *Copies*; which contain the freeman's oath in print, and, upon the top or bottom of the oath, in the hand of the under clerk, of the deputy town-clerk, a memorandum of the name of the freeman, and the date of his admiſſion and ſwearing in. The preſent deputy town-clerk had enrolled a great many who had produced *copies* of this ſort, on which the admiſſions were mentioned as prior to his coming into the office. He ſaid he had been informed by his predeceſſor, that many had been admitted, and had received *copies*, whom he had neglected to enrol, and that he had deſired him to enrol them, and that he would pay him for it, which he had done; and that he had enrolled them according to the dates on the *copies*. He had alſo enrolled others, who had no *copies*, on evidence of their having exerciſed the franchiſes of freemen; or, on the teſtimony of perſons who had been preſent at former elections where their titles were ſtrictly ſcrutinized.

3. A third objection was, That certain voters had been made freemen by redemption, *but not in order to trade within the city*.

4. A fourth, That ſome, who claimed as freemen by redemption, had only paid a colourable trifling ſum, and were to be conſidered as mere honorary freemen.——The counſel for the petitioner endeavoured to eſtabliſh, that there is a certain valuable conſideration or fine (20l.) paid, when the freedom of the city is really and *bona fide* acquired by redemption. But this was not much inſiſted on.

5. It ſeems honorary freemen are entitled to exerciſe every franchiſe, except that of voting in elections of members of Parliament.

(1) Cap. 46. *Vide ſupra*, vol. ii. p. 77, 78.

Parliament. The ſons of ſome honorary freemen, traders in the city, had been admitted to their freedom, as having a right by birth, and ſome under this deſcription had been received on the poll for the ſitting members. Theſe were objected to. It was contended, that the father could not tranſmit to the ſon, by deſcent, a title which was not in himſelf.

6. Two voters were objected to, who live in houſes which are in the gift of ſix maſters, or guardians, members of the corporation, who pay no rent but receive 1s. 6d. a year. It was argued, that this was a diſqualification, under the words of the laſt determination, being in the nature of *alms*.—It did not appear, that, in former times, the votes of perſons living in thoſe houſes, had been objected to, or rejected.

Nineteen perſons, who, before the election, had claimed to be admitted to their freedom, as entitled by ſervitude, offering to prove the execution of their indentures, and that they had ſerved their time, and who, were refuſed, tendered their votes for Sir Watkin Lewes, and were rejected (1). The ground was this: They were apprentices to the corporation for the manufacture of Worceſter China, which is carried on without the city; and the mayor and aldermen, who have the right of of admitting freemen claiming by title, contended, that the ſervice which gives a title, cannot be to a corporate body, and that it muſt be within the city. —Steel, one of the 19, ſued out a mandamus, which was tried after the election, and being decided in his favour, all the 19 were admitted freemen in December, 1774. It was argued, therefore, that they ſhould be put on the poll, agreeably to the received rule in ſimilar caſes (2).

IIId Head.] On the head of the ſpecial report, it was ſaid, that this caſe required, that the Committee ſhould in that manner, teſtify to the Houſe, their ſenſe of the corruption which had taken place; as much at leaſt as any of thoſe caſes which had already been the ſubject of ſpecial reports. The common-council had, it was alledged, been, in its corporate capacity, the inſtrument of bribery for the ſitting

(1) *Quære?*

(2) *Vide ſupra*, vol. i. Caſe of Shrewſbury. Vol. ii. Caſe of Sudbury. *Infra*, Caſe of Derby.

ſitting members. The pretext of appointing ſuch a number of conſtables, was but a groſs artifice, deviſed with a view to evade the law, and they deſerved to be particularly animadverted upon and puniſhed by the Houſe for ſuch a ſhameful abuſe of their duty and the truſt which, by the conſtitution of the borough had been beſtowed on them.

The principal ground of complaint againſt the returning officer was, that, after having rejected voters for the petitioner, who claimed by birth, as the ſons of honorary freemen, he had admitted others in the ſame predicament for the ſitting members.

When the counſel for the petitioner were going into the evidence, concerning the interference of the peer, complained of in the petition, the counſel on the other ſide objected to it. They argued, that, if the interference was ſuch as would not have been improper in a commoner, (and the contrary was not pretended) the Committee could not take cognizance of it, being only a matter of privilege, which was not eſſential to the merits of the election. That ſuch an enquiry might have been made by the ancient Committees of elections, which were alſo Committees of privileges; but that now there is a diſtinct Committee of privileges appointed annually, before whom ſuch a complaint ought to be carried.

The Committee, however, thought, that they were bound to entertain the evidence, by the words of their oath, as they were ſworn to try *the matter of the petition.*

The evidence on the part of the ſitting members was entirely defenſive. The direct acts of bribery, and the promiſes charged upon Mr. Walſh and his agents, were poſitively contradicted by perſons ſaid to have been preſent when they took place; and, in ſome inſtances, by the perſons who were ſaid to have given, or to have received, bribes; and thoſe perſons in denying the acts of bribery, when confronted with the witneſſes on the other ſide.

As to the conſtables, the purport of the evidence was, That there had not been above 100 appointed, till after ſeveral propoſals for the regular conduct of the poll had been rejected by the petitioner. That it was firſt propoſed, that the voters ſhould poll by tallies, which Sir Watkin Lewes refuſed to agree to, becauſe the two ſitting members would have had two tallies for his one. That on this objection, an offer was made, to ſuffer him to poll a tally for each

each tally polled by either of the ſitting members, which he alſo refuſed. And that he likewiſe would not conſent that a partition ſhould be built, for the voters in his intereſt to come to poll on one ſide, and thoſe in the intereſt of the ſitting members on the other, which was meant as an expedient for preventing riots. That, at the election in 1773, which was conteſted by him and Mr. Rous, (Mr. Jackſon, then mayor, being a friend to Sir Watkin) a great number of conſtables had been appointed of his party, who went armed with bludgeons, and occaſioned great riots and confuſion. That, at the preſent election, there was at leaſt 200 or 300 perſons called body guardſmen, who were choſen by clubs of Sir Watkin's friends in the different pariſhes, and who attended him during the election. That they were paid two ſhillings a day each, out of a fund raiſed by the ſubſcription of the members of the clubs*. That this circumſtance had convinced the magiſtrates, that at leaſt 100 conſtables would be neceſſary to keep the peace; and that, when Sir Watkin declined conſenting to any plan for taking the poll in a regular manner, it became neceſſary to augment the number. That, as the intention was to appoint none but inhabitants, and friends to the corporation, it was natural that moſt of the conſtables ſhould be freemen, (the majority of the inhabitants being ſo) and that they ſhould vote for the two candidates whoſe cauſe was eſpouſed by the corporation. That there were no queſtions aſked of the conſtables about their votes when they were ſworn in. That their appointment could not be meant to influence them in favour of Walſh and Rous, for that they had all promiſed their votes to thoſe gentlemen before. That the few infirm perſons made conſtables were appointed to afford them a protection under that character. The promiſes of money to the conſtables (except the 1s. 6d. a day) were poſitively contradicted, by the witneſſes for the ſitting members; only, the mayor ſaid, he had given half a guinea to one perſon, as charity, out of his own pocket.

It was contended, that when voters come from a diſtance to ſerve a candidate, it is not bribery to pay them a reaſonable compenſation for their loſs of time.

It was proved, that Mr. Walſh had repeatedly told his agents, that they muſt not, upon any account, give or promiſe,

(1) It appeared that Sir Watkin did not contribute to this fund.

miſe, money or other reward, to the voters; and thoſe who attended him on thoſe occaſions, without firſt emptying his pockets of all the money in them.

I have thus given a general, though far from a complete, account of the nature and tendency of the evidence produced on both ſides in this caſe; not from a perſuaſion that it can be of much ſervice on any future occaſion, but merely to convey to the reader ſome idea of a cauſe which, on account of its great length, as well as many other circumſtances, attracted in an extraordinary degree the attention and curioſity of the Public. It ſeemed to be underſtood *from the beginning*, that unleſs *all* the conſtables were ſet aſide, a majority of votes muſt remain with Mr. Rous: *After the different inſpections of the books, by which the enrolment of ſuch a number of perſons had been diſcovered who were objected to as not enrolled*, it appeared to be thought neceſſary that all the conſtables ſhould be ſtruck off the poll, to leave the petitioner a majority over Mr. Walſh. The Committee, if this was really ſo, had only to act as a jury, in determining the cauſe. Indeed the caſes of Chippenham and Stockbridge (1) were mentioned, and it was argued, (but ſeemingly not with much hopes) that, on the authority of thoſe caſes, it is not neceſſary for a petitioner, who has proved bribery on a ſitting member, to diſqualify a majority of his votes, in order to entitle himſelf to the ſeat. At leaſt, the Committee made no particular determination on any of the different points, and nothing can be inferred with regard to them, from their ultimate deciſion.

Several important queſtions of evidence were fully diſcuſſed by the counſel, and determined by the Committee. To the chief of theſe I paid particular attention, and I ſhall give a faithful ſtate of them; being daily more and more convinced, by my attendance on election cauſes, that it is highly neceſſary that certain fixed rules with regard to evidence, ſhould be adopted and adhered to by all Committees, and that the determinations of former Committees on this ſubject ſhould be preſerved in writing, becauſe, if they are not, they will be cited and urged as authority to other Committees, from mere memory; which is always extremely fallacious, and grows daily more ſo as the intervening diſtance of time continues to increaſe.—I ſhall

diſtinguiſh

(1) *Supra*, vol. ii.

distinguish the different points according to the days when they were argued and decided.

[1.] 30 Jan. Mr. Williams, the returning officer, being called by the counsel for the petitioner, to produce the poll, the counsel on the other side proposed to cross-examine him as to the appointment of the constables, and other points of the case.

This was objected to, as contrary to the practice of Committees, and as what would be extremely inconvenient to the petitioner's counsel, by anticipating the defence, before they had examined witnesses to establish the charge.

On the part of the sitting members it was answered, That it is the established practice in other courts of justice, for one party to cross-examine witnesses called by the other party, merely for the production of deeds, or writings; and that, as the petitioner's counsel might call their witnesses in the order they chose, the inconvenience, if any, was to be imputed to themselves.

The court being cleared, the Committee, after deliberation, determined,

That the counsel for the sitting members should not cross-examine the witness, to the appointment of the constables, *at that time*.

[2.] 31 Jan. One James Fincher was going to give an account of the conduct of a Mr. Swift, tending to affect Mr. Walsh.

The petitioner's counsel objected to this, because no evidence had been previously given to shew that Swift was an agent.

The point was argued, and the court being cleared, the Committee, after deliberation, resolved,

"That, when evidence is proposed to be produced of "the criminal acts or conversation of any person alleged "to be an agent of any of the parties, agency shall be previ- "ously proved."

This resolution was accompanied with the following direction to the counsel:

"The Committee expect that the counsel, immediately "after proving the agency of any person, shall proceed to "the *proof* (A) of the criminality of such agent."

☞ The idea of an agent, whether general, or for a special purpose, or single act; whether formally commissioned, indirectly authorized, or avowed after the act done, does not seem to be of difficult comprehension. Yet the several

ral definitions of "agent," which were given in this cauſe, were very far from being ſatisfactory. They ſerved ſtrongly to confirm the old maxim; *Definitiones in jure ſunt periculoſæ.*

[3.] 19 Feb. On the 7th of February, one Thomas Collins had been examined, and it appeared that he had gone to different voters in the intereſt of the ſitting members, pretending to be their friend, in order to draw from them declarations that they had received money for their votes; but, in giving his evidence, he prevaricated in the groſſeſt manner. On the 10th of February, he was publickly reprimanded by the Chairman. On the 19th, the counſel for the petitioner having propoſed to call him again, the counſel on the other ſide objected to it. They ſaid, that, after having been cenſured by the Committee for prevarication, he certainly could not merit any credit from them. It appeared, likewiſe, that he had been in the room ſince, during the examination of other witneſſes, and it is a rule laid down at the beginning of every cauſe, that no witneſſes ſhall be admitted, who had been preſent when others were giving their evidence (1).

The Committee did not permit him to be called.

☞ After this, a paper was paſted on the door of the Committee Room, by order of the Committee, to acquaint all perſons with the above-mentioned rule.---The effect of this rule is in a great meaſure loſt when a cauſe laſts for a number of days, or weeks, for the witneſſes have ſeveral ways of hearing what has been given in evidence, before they are called, without coming to hear it themſelves. Among the great concourſe of people, who from curioſity or intereſt, are conſtantly in the room, there are many, who for the ſake of converſation, and ſome, who for worſe purpoſes, relate what has paſſed. Copies of the minutes of each day being delivered to the agents on both ſides, their contents tranſpire; and the news-papers are alſo filled with a ſort of daily hiſtory of the proceedings. Towards the end of this cauſe ſeveral witneſſes, who came to contradict what had been ſworn in the beginning, declared, that what they knew of the evidence, they had learned by reading the news-papers in the country.

[4.] 22 Feb. The mayor of the preceding year is, by the general uſage of Worceſter, choſen one of the aldermen and

(1) *Supra*, Caſe of Cardigan, p. 107.

and Juſtices, for the year after his mayoralty, and is called *high* alderman. He has no particular authority more than the others, and there is no direction in the charters of the city which make it neceſſary to make the mayor of the former year an alderman. The counſel for the petitioner propoſed to produce evidence to prove, that, before the election, a Mr. Jackſon, who was in the intereſt of the petitioner, had been choſen mayor for the foregoing year, becauſe it was an expenſive office; and that he had been paſſed by in the election year, and another perſon made high alderman, leſt, in the capacity of a Juſtice, he ſhould have counteracted the partial appointent of conſtables. On the part of the ſitting members, this evidence was oppoſed as *immaterial*, ſince it was contended that the conſtitution of the borough required the appointment of Jackſon to be an alderman.

The counſel for Sir Watkin Lewis ſaid, that, as the general practice had been broken through in the caſe of Jackſon, this was a very proper circumſtance to be laid before the Committee, in ſupport of the charge of criminal partiality againſt the corporation.

The evidence was admitted.

[5.] 27 Feb. Suſannah Bevan, one of the witneſſes for the petitioner, had ſworn to an act of bribery by one Michael Brown, an agent for Mr. Walſh.—The counſel for Mr. Walſh propoſed to call Brown himſelf to contradict her evidence.

This was objected to.

It was argued, That, both from principle and former determinations, it was clear, that he was an incompetent witneſs for ſuch a purpoſe.—That in the caſes of Milborne Port (1) and Shafteſbury (2), the teſtimony of the agents had been refuſed, when offered to contradict the evidence given of their acts. That, in the preſent caſe, the agents were complained of in the petition, and were therefore to be conſidered as parties to the cauſe. That to permit an agent of Mr. Walſh to diſprove an act of bribery done by ſuch an agent, was in effect to receive Mr. Walſh himſelf to diſprove it. That a witneſs ought not to be put in a ſituation where he muſt either accuſe himſelf, if he has been guilty of bribery, and expoſe himſelf to the danger of a ſpecial report and a proſecution in the Houſe of Commons, ſimiliar to thoſe carrying on in the caſes of Shafteſbury

(1) *Supra*, vol. i. p. 67.
(2) Vol. ii. p. 150.

Shafteſbury and Hindon, or elſe to ſubmit to the temptation of acquitting himſelf by the crime of perjury. That, in this point of view, ſuch a witneſs muſt be conſidered as *intereſted*; and that, in the courts of law, the moſt remote degree of *intereſt* is ſufficient to render evidence inadmiſſible. That, if it ſhould be once determined that agents may be produced to deny acts charged upon them, whenever they are not produced the inference will be that they are conſcious of guilt. That the caſe of the perſons now under proſecution in the caſe of Shafteſbury would be peculiarly hard, if it ſhould turn out that another Committee admitted a ſort of evidence, of which they could have availed themſelves, perhaps the report againſt them, and the conſequent proceedings, might have been prevented. That, if one candidate were to be guilty of bribery without the intervention of agents, and another ſhould bribe only through the medium of agents, though each would be equally guilty, the firſt would not, and the other would, by converting his agents into witneſſes, have it in his power to contradict the proof of his guilt.

On the part of Mr. Walſh and Mr. Rous, (for though Brown was Mr. Walſh's witneſs, the Committee, after a debate, at the bar on the ſubject, agreeed to hear Mr. Rous's counſel on this queſtion, to prevent a new argument if it ſhould ariſe again in his part of the caſe) it was ſaid,

That Brown's evidence was certainly admiſſible. That he was no party to the cauſe, the only parties being Sir Watkin Lewes and the ſitting members. That what he might ſay on his examination could not be produced againſt him on any other occaſion; and that beſides, he would on no ſuppoſition be under any neceſſity of criminating himſelf, becauſe he would not be obliged to give any anſwers that would have that effect. That, inſtead of opening a door to perjury, by admitting ſuch evidence, the Committee would give witneſſes an opportunity of perjuring themſelves, without the danger of contradiction, by rejecting it. That, in a proſecution for bribery in Weſtminſter Hall againſt Mr. Walſh, Brown would be a competent witneſs. That, if a perſon charged as an agent ſhould be holden not to be a competent witneſs, it would be an eaſy matter for a petitioner's witneſſes to deprive a ſitting member of the teſtimony of all his friends, and cauſe, two of the candidates having ſtood and of thoſe whom he might particularly chooſe to accompany

accompany him in all his converſation with voters in order to be able to contradict any falſe accuſation, by ſwearing that thoſe perſons had acted as his agents. That objections which only go to the credit of a witneſs, ought not to be attended to in a queſtion of admiſſibility. That the diſtinction is well known, and clearly eſtabliſhed in the courts of common law. That the Committee, after having, as a court of law, admitted Brown's evidence, would judge, in the capacity of a jury, of the degree of credit due to it. That, as to the caſe of Milborne Port, the objection had not been taken by the counſel, but was ſuggeſted by one of the members of the Committee, and that the counſel on both ſides were aſtoniſhed when they found it had prevailed. That, however, the circumſtances of Mr. Medlycot, whoſe evidence was rejected in that caſe, were peculiar; for that he was not a mere common agent, but was, in truth, the perſon chiefly concerned in the entirely upon his intereſt in the borough. That in the caſe of St. Ives, (which was poſterior to thoſe of Milborne Port and Shafteſbury) on the authority of thoſe caſes, the counſel for the petitioners had objected to the evidence of one Robinſon, an agent for the ſitting members, who was charged by their witneſſes with acts of bribery, but that the objection was over-ruled by the Committee, and the evidence admitted. That this part of the caſe is not mentioned in the printed report, but that they knew it to have been as now ſtated, one of themſelves having been the perſon who took the objection. (1)

The Committee, after long deliberation during that day, and part of the day following, reſolved to admit the evidence (B).

[6] 1 March. One Wintle having ſworn that he ſaw Mr. Walſh give a bribe to one Elias Gregg or Gregory, the counſel for the petitioner objected to the calling Gregg or Gregory, the counſel for the petitioner objected to the calling Gregg himſelf to contradict Wintle's evidence.

They ſaid, That a voter is certainly intereſted to diſprove what may tend to annihilate his own vote, and that therefore, according to the doctrine of Weſtminſter-Hall, Gregg's evidence was inadmiſſible. That, on this ground, the evidence of a freeholder, in the caſe of Haſlemere, had been rejected,

(a) Mr. Mansfield.

jected, when propoſed to be called to prove the right of perſons in the ſame ſituation with himſelf.

It was anſwered,

That this caſe was different from thoſe of freeholders, freemen, or others, called to prove a general right of election in perſons of their own deſcription, becauſe they have an intereſt to eſtabliſh a *permanent* right, which they may exerciſe on future occaſions. That a voter who comes to declare, whether he has, or has not, been bribed, hath not ſuch an intereſt; for that, whatever the fact might turn out before the Committee, his future right to vote would not be affected. That the competency of a voter to give evidence concerning his being bribed cannot be denied, ſince the legiſlature has preſcribed that they ſhall, at the poll, give evidence of it upon oath if required. That, on the trial of the former caſe of Worceſter, a man who was charged with having received 5s. 3d. from Mr. Rous for his vote, was admitted to contradict the charge.

In reply, it was contended,

That, if a *permanent* right of voting is allowed to be a ſort of intereſt ſufficient to render a witneſs incompetent, the exerciſe of that right, but for *once*, is an intereſt of the ſame kind, and only differs in degree, and that the ſmalleſt degree of intereſt is, in the courts of law, an inſurmountable objection to the admiſſibility of a witneſs. That the bribery oath, which may be adminiſtered at the poll, is only a ſort of parliamentary teſt, and cannot be conſidered as a diſpenſation to a perſon, otherwiſe incompetent, ſo as to make him a witneſs on a trial before a Committee. That in the former caſe of Worceſter the objection had not been taken.

The court being cleared, the Committee deliberated among themſelves, and then adjourned; and, next day, after deliberating again, the Chairman informed the counſel, that they had determined to *repel* the objection to Gregg's evidence.

[7.] 4. March. Mr. Mathers, the mayor, was propoſed to be called as a witneſs, to diſprove the charge, againſt himſelf and the other Juſtices, that they had abuſed their corporate powers, and had corruptly joined in making conſtables for the purpoſe of influencing the election.

His evidence was objected to, on the part of the petitioner; They ſaid,

That

That, as there was a *ſpecific* charge againſt the mayor, in the petition, and the petitioner had applied to the Committee for a ſpecial report concerning his conduct, and that of the other members of the corporation, he was clearly a party to the cauſe, and could not be a witneſs.

The anſwer to this was,

That, if a man's teſtimony could be rendered inadmiſſible by a ſpecific allegation againſt him in the petition, this would be a ſtill more effectual way of depriving the ſitting member of all his witneſſes, than the other method which had been tried, of deſtroying the competency of a witneſs by ſwearing that he was an agent. It was alſo obſerved, that, almoſt in every petition, there is a charge againſt the returning officer; and yet, that in moſt election cauſes, tried during this and the preceding ſeſſion, the returning officer had been examined as a witneſs.

The Committee, after deliberation, reſolved,

To admit the evidence.

[8.] The counſel for the ſitting members objected, in the beginning of the cauſe, to the admiſſion of evidence to prove the declarations of voters, that they had been bribed (1). The Committee, however, admitted ſuch evidence as againſt the voters themſelves, ſo as to annul their votes; but not as againſt the ſitting members, ſo as to diſqualify them.

There was conſiderable difficulty in this caſe, about the manner in which the counſel were to proceed. When Mr. Walſh's Counſel opened his caſe, it was expected, on the part of the petitioner, that the counſel for Mr. Rous ſhould proceed immediately to open his. But they did not; and when they came to examine *in chief* the witneſſes called on the part of Mr. Walſh, this was objected to by the petitioner's counſel. They ſaid, that if joint defendants are permitted, in courts of law, to examine one another's witneſſes, when they make their defence ſeparately, it is only after each has opened his defence. That what was now attempted would be attended with great inconvenience to the petitioner, as he could not be prepared to meet or obviate the effect of evidence, when the uſe to be made of it had not been explained.

The Committee were of opinion with the counſel for the petitioner. They themſelves, however, ſoon after, (finding

(1) *Vide ſupra*, Caſe of Shafteſbury, vol ii. p. 150.

that, on the croſs examination of the witneſſes for Mr. Walſh, many things would come out concerning Mr. Rous, which they would loſe the benefit of, if Rous's counſel ſhould not afterwards call the ſame witneſſes), deſired that the counſel for Mr. Rous might be permitted to croſs-examine them. —This was accordingly agreed to by the Committee; who, at the ſame time, required, that Mr. Rous's caſe might be opened as ſoon as poſſible.—There was a ſeparate ſumming up for him, and for Mr. Walſh, on different days; and then a general reply by the counſel for the petitioner.

The evidence on both ſides, with the arguments of counſel, excluſive of the reply, laſted from the 23d of January, to the 13th of March incluſive; making 38 days, beſides Sundays. There were about 170 witneſſes examined on the whole, many of them contradicting each other in the moſt poſitive manner; from which, and the duration of the cauſe, ſome idea may be formed of the difficulties the Committee had to encounter, in arranging the evidence, in weighing the contradictory parts of it together ſo as to find which ought to preponderate, and in forming, at length, a general deciſion.

On the 5th of February, Sir Walden Hanmer being ſeized with a fit of the gout, the leave of the Houſe was obtained for his abſenting himſelf from farther attendance, if his health ſhould require it (1). Accordingly, he did not attend after that day, and the Committee were reduced to the number of fourteen.

" On the 13th of March the Chairman acquainted the Houſe, that the evidence on both ſides before the Committee was cloſed, and that ſome of the members being indiſpoſed, the ſeveral parties had given their conſent that an application ſhould be made to the Houſe, that the Committee might have leave to adjourn till the morrow night. And

An order of the Houſe was made for that purpoſe (2).

On the 27th of March, the day before the Committee was to meet again, the Chairman informed the Houſe that he had received a letter deſiring him to acquaint the Houſe that he had received a letter, deſiring him to acquaint the Houſe, that John Walter, Eſq; one of the members, was ill in the country, and thereby prevented from attending the next day; and

(1) Votes, p. 241.
(2) *Ibid.* p. 453.

and an order was made, giving them leave to proceed notwithſtanding his abſence (1).

By this means the Committee being reduced to thirteen, if any accident had happened to deprive them of another member for three ſitting days, before they had decided the cauſe, the whole proceedings would have fallen to the ground; and a new Committee muſt have been choſen.

On the 28th of March, the counſel for Mr. Walſh ſummed up his caſe (the evidence for Mr. Rous having been ſummed up before the adjournment).

On the 29th, the petitioner's counſel replied.

The Committee continued to meet every ſucceeding day (Sunday excepted) till the Friday following the 5th of April, when they agreed on their determination.

On the 2d of April, the Houſe had adjourned to the 18th (2).

On Thurſday, the 18th of April, the Committee, by their Chairman informed the Houſe, that they had determined,

That the two ſitting members were duly elected (3).

They made no ſpecial report.

(1) Votes, p. 532. (2) *Ibid.* p. 566. (3) *Ibid.* 576.

NOTES

ON THE CASE OF

WORCESTER.

PAGE 123. (A). It is impoſſible to conceive that the Committee uſed the word "*proof*" on this occaſion in its ſtrict legal ſenſe; becauſe to ſhow that agency was *proved*, (that is, that the Committee thought ſo) it would be neceſſary, in every particular inſtance, for them to come to a reſolution, importing that the evidence offered for that purpoſe, did, in their opinion amount to *proof* of it; and till ſuch reſolution had been delivered, it would not have been competent to the counſel to go into evidence of bribery by the ſuppoſed agent.—All that was meant was, that ſome probable ground of agency ſhould be laid, before the attempt to prove bribery

The reader will obſerve the contrariety in the determinations of the ſeveral Committees on this ſubject. (See the caſes of Milborne Port vol. i. p. 67. Hindon, vol. i. p. 89. Briſtol, vol. i. p. 136. Shafeſbury, vol. ii. and Ivelcheſter, *ſupra*, p. 77, 78.) The point ſtrikes me as a matter of mere regulation, on which a difference in the rule adopted by different Committees cannot be attended with any bad conſequence. If the evidence of bribery is begun with, and afterwards no evidence, or inſufficient evidence, of agency is produced, we muſt ſuppoſe that the Committee will lay the evidence of bribery out of the caſe, and proceed, in forming their verdict, as if it had never been given. In criminal proſecutions at common law, when the evidence of an accomplice is competent, but without other corroborating evidence is not ſufficient for conviction, a ſimilar difficulty ariſes. If the accomplice is firſt produced, and after he has given his teſtimony no other evidence is brought to ſupport it, what he has ſaid becomes *immaterial*, and can be of no avail againſt the priſoner. Yet the practice of different Judges, like that of different Committees, has been different

different in this reſpect. Some have made it a rule, that the corroborating evidence ſhould firſt be produced before the examination of the accomplice, but others have left this matter to the diſcretion of the counſel who conducted the proſecution.

P. 127. (B). I have looked into the clerk's minutes in the Caſe of St. Ives, and find the entry of what relates to the queſtion of Robinſon's admiſſibility to be as follows:

(The witneſſes for the petitioners had ſworn, that the money which they had received from Mr. Praed the father was given them by the hands of Robinſon; and that he was in the room during the whole of the converſation between them and Praed on the ſubject.)

"The counſel for Mr. Praed propoſe to examine Mr. Robin-
"ſon to give an account of what converſation paſſed between
"Mr. Praed and the perſons who had been examined, and to
"diſprove what they have ſaid.

"This evidence objected to by Mr. Mansfield, Robinſon be-
"ing a principal agent in the affair.

"Mr. Buller follows Mr. Mansfield in the objection.

"Mr. Lee heard in anſwer.

"Mr. Elliot follows Mr. Lee.

"Mr. Mansfield heard in reply.

"Court cleared.

"Counſel called in, and acquainted by the Chairman, that
"the Committee are of opinion, that William Robinſon is a
"competent witneſs."

THE

XXXI.

THE

CASE

OF THE BOROUGH OF

DERBY.

The Committee was choſen on Wedneſday, the 31ſt of January, and conſiſted of the following Gentlemen:

Paul Field, Eſq; Chairman,	Members for	Hertford.
Philip Raſhleigh, Eſq;		Fowey.
Charles Dundas, Eſq;		Richmond.
Thomas Hay, Eſq;		Lewes.
Benjamin Langlois, Eſq;		St. Germains.
Staates Long Morris, Eſq;		Bamf, &c.
Thomas Dundas, Eſq;		Stirlingſhire.
Sir Henry Hoghton Bart.		Preſton.
Hon. Charles Marſham,		Kent.
Sir Thomas Wynne, Bart.		St. Ives.
Sir Thomas Miller, Bart.		Lewes.
Andrew Stuart, Eſq.		Lanerkſhire.
Hon. Geo. Venables Vernon,		Glamorganſhire.
NOMINEES.		
Of the Petitioners.		
Abel Moyſey, Eſq;		Bath.
Of the Sitting Member.		
John Elwes, Eſq;		Berſhire.

PETITIONERS.

Daniel Parker, Eſquire.

Several Electors of Members to ſerve in Parliament for the Borough of Derby.

Sitting Member.

John Giſborne, Eſquire.

COUNSEL.

For the Petitioners.

Mr. Bearcroft, Mr. Balguy.

COUNSEL.

For the Sitting Member.

Mr. Mansfield, Mr. Lee.

THE

THE

CASE

Of the BOROUGH of

DERBY,

AT the General Election, lord Frederick Cavendiſh, and Wenman Coke, Eſq; were choſen members for this borough, but, within the time limited for that purpoſe by the annual order of the Houſe (1), Mr. Coke, who was likewiſe returned for the county of Norfolk, made his election to ſerve for that county. A new writ being ordered to ſupply the vacancy for Derby, the election began on the 27th of January, 1775, Mr. Giſborne and Mr. Parker Coke were candidates. The former was returned; and Coke, (2) as well as certain perſons in his intereſt (3), petitioned the Houſe. The day appointed for taking their petitions into conſideration was the 14th of July, and, before that time, the Parliament roſe. But on the 31ſt of October, at the beginning of the ſecond ſeſſion of this Parliament, two petitions, *the ſame in ſubſtance with the former* (4), were preſented to the Houſe.

On Thurſday, the 1ſt of February, 1776, the Committee being met, the two petitions were read.

Mr. Coke's petition ſet forth; That he was elected by a great majority of legal voters, but that Chriſtopher Heath, the

(1) Votes, 5 Dec. 1774, p. 5.
(2) Votes, 10 Feb. 1775, p. 206.
(3) *Ibid.* 16 Feb. 1775, p. 232.
(4) *Supra*, Pref.

the mayor and returning officer, had acted with great partiality, by rejecting the votes of many perſons who, had an undoubted right to poll, and who tendered their votes for the Petitioner, and by admitting for Mr. Giſborne the votes of divers perſons who had no right; and that, by theſe and many other unwarrantable practices of the mayor, as well previous to, as at, and in relation to, the election, the fitting member was returned (1).

The other petition ſet forth; That the petitioners, and divers others, having a lawful and undoubted right, by birth or ſervitude, to the freedom of the ſaid borough, and to be ſworn burgeſſes thereof, previous to the ſaid election claimed to be *admitted* burgeſſes of the ſaid borough, but that the mayor, and divers aldermen of the ſaid borough, with a view to deprive the petitioners, and others, of their right of voting at the then next enſuing election, and in order to procure a return in favour of Giſborne, refuſed to *admit* them to their freedom, although the ſaid mayor and aldermen, at the ſame time, admitted ſeveral perſons under the like circumſtances with the petitioners: that Coke was duly elected, by a majority of legal votes; but that the mayor had, nevertheleſs, made a return in favour of Giſborne.---Then followed other allegations, reſpecting the receiving and rejecting votes, to the ſame effect with thoſe in the petition of Mr. Coke (2).

There is no determination of the right of election in Derby, by the Houſe of Commons; but the counſel on both ſides agreed, That every member of the corporation has a right to vote.

Derby, which is a borough and corporation by preſcription, in the end of the reign of Charles II. ſurrendered all prior charters and grants, and all its liberties and privileges, into the hands of the Crown. Upon this, a new charter was granted, on the 5th of September, in the 34th year of Charles II. By this charter, the corporate name is, "The mayor and burgeſſes of the borough of Derby, in the county of Derby;" and the corporation conſiſts of a mayor, 9 aldermen beſides the mayor, (or 10 in all) 14 brothers, *(confratres)* 14 capital burgeſſes, a recorder, a common clerk, and an indefinite number of burgeſſes. The mayor is choſen annually, on Michaelmas-day, from among

(1) Votes, 31 October, 1775. p. 33.
(2) Ditto, p. 33, 34.

among the aldermen, by a majority of voices of the aldermen and brethren. The aldermen hold their office for life, unleſs removed for ill behaviour, or non-reſidence. If, by death, or ſuch removal, a vacancy happens, one of the brethren is choſen to ſupply the place by the majority of the mayor and remaining aldermen. The brothers, and capital burgeſſes, are, in like manner, choſen for life; but liable, as the aldermen, to be removed for ill behaviour or non-reſidence. A vacancy among the brothers is ſupplied from among the capital burgeſſes, by the election of the majority of the mayor, aldermen, and remaining brothers; and a vacancy among the capital burgeſſes from among the common burgeſſes, inhabitants of the borough, by the election of the majority of the mayor, aldermen, brothers, and remaining capital burgeſſes. The recorder is choſen by the majority of the mayor, aldermen, common clerk, brethren, and capital burgeſſes, and muſt be *vir probus, diſcretus, & in legibus Angliæ eruditus.* His office continues during the pleaſure of the mayor, aldermen, brothers, and capital burgeſſes; and the voice of the mayor is neceſſary for his removal, as it is for the removal or diſfranchiſement of all other officers or members of the corporation. The common clerk, who is alſo, *ex officio*, coroner, and clerk of the peace, is choſen by the major part of the mayor, recorder, aldermen, brothers, and capital burgeſſes, the mayor or recorder being one, and continues in his office during the pleaſure of the majority of his electors. The aldermen, brethren, and capital burgeſſes muſt be conſtantly dwelling, and reſident in the borough. The mayor, aldermen, brethren, capital burgeſſes, recorder, and common clerk, (either on the day of election, or, if abſent, within one month after the election,) before his predeceſſor, or, in his abſence, before the recorder and common clerk, or one of them; the aldermen, brethren, and capital burgeſſes, and the recorder, before the mayor, for the time being; and the common clerk, before the mayor and recorder, or either of them, and as many of the aldermen, brethren, and capital burgeſſes as chooſe to be preſent. The recorder, and common clerk, cannot enter on their offices till approved of by the king. The mayor and recorder have power to appoint deputies; the mayor's deputy to be named from among the aldermen, and the recorder's deputy to be ſkilful in the laws of England. They too muſt take an oath of office before the mayor.

The

The aldermen, brethren, and capital burgeſſes, form the common council, and the majority of them, together with the mayor, have power to make bye-laws, impoſe fines, &c. The mayor, the biſhop of Litchfield and Coventry, his chancellor, the recorder and common clerk, the mayor, of the year preceding, and the four ſenior aldermen, are the local Juſtices of the peace, but removable at the king's pleaſure. Theſe are ſuch material parts of the conſtitution as relate to the election, and numbers of the different officers of the borough, as they are ſpecially eſtabliſhed by the charter of Charles II. which was given in evidence to the committee. There is, beſides, a *general confirmation* " *of all former grants and privileges, franchiſes, immunities,* &c. in the following words:

" *Et ulterius, de conſimili gratiâ noſtrâ ſpeciali, ac ex* " *certâ ſcientiâ & mero motu noſtris, pro nobis, heredibus* " *et ſucceſſoribus noſtris, damus, concedimus & confirmamus* " *præfatis majori et burgenſibus burgi prædicti, et ſucceſſo-* " *ribus ſuis, omnes & ſingulas litteras patentes, chartas &* " *confirmationes preclariſſimorum progenitorum vel anteceſſo-* " *rum noſtrorum quorumcunque, eiſdem majori & burgenſi-* " *bus burgi de Derby prædicti, aut prædeceſſoribus ſuis,* " *per quodcumque nomen, ſive per quæcumque nomina incor-* " *porationis ante hæc tempora facta, conceſſa, ſeu confirmata,* " *ac omnes et ſingulas donationes, conceſſiones, confirmationes,* " *reſtitutiones, conſuetudines, ordinationes, explanationes,* " *articulos, et omnes alias res quaſcunque, in quibuſcunque* " *litteris patentibus ſive chartis quorumcunque progenitorum* " *aut anteceſſorum noſtrorum, nuper regum & reginarum* " *Angliæ, necnon omnia et ſingula in dictis litteris patentibus* " *conceſſionibus, chartis, confirmationibus, ſeu eorum aliquo,* " *contentis, recitatis, ſpecificatis, confirmatis ſeu explanatis,* " *ac omnes et ſingulas juriſdictiones, authoritates, exempti-* " *ones, privilegia, libertates, franchiſas, quietantias, im-* " *munitates, liberas conſuetudines quaſcumque, cum alterati-* " *onibus, additionibus, explanationibus et declarationibus ſu-* " *pra mentionatis.*"

By this clauſe, all ſuch parts of the former conſtitution as were not altered by new proviſions, were continued and confirmed.

Thus far the counſel on both ſides agreed. But it will appear, in the ſequel of the caſe, that they differed with regard

regard to one very material part of the conſtitution, *viz.* the legal mode of admitting perſons to be freemen, or burgeſſes (for theſe terms were agreed to be ſynonimous in Derby).

The numbers on the poll, as produced to the Committee by the mayor, who is the returning officer, were as follow:

For Mr. Giſborne	343
For Mr. Coke	329
Majority for Mr. Giſborne	14

But the counſel for the petitioners, in opening their caſe, ſaid, that they propoſed to add 42 to the poll for Mr. Coke, *viz.*

26, who, being entitled to be admitted to the freedom of the borough, had demanded ſuch admiſſion before the election, and having been refuſed, had tendered their votes, at the poll, in favour of Mr. Coke.

12, under the ſame circumſtances, but who had demanded to be admitted on different occaſions.

4, who had their freedom, but whoſe votes were rejected by the mayor.

They alſo propoſed to ſtrike off 16 from the poll for the ſitting member, *viz.*

5, who live in an alms-houſe called Derby-Hoſpital.

3, for having received pariſh relief.

3 honorary burgeſſes, admitted within the year.

3, who had been admitted burgeſſes, on the title of ſervitude, without having ſerved a ſeven years apprenticeſhip.

2, who were never admitted to their freedom.

In the courſe of the cauſe, however, it was only neceſſary for the Committee to hear evidence, and to decide, concerning the votes of 27 (1) of thoſe who, claiming by antecedent titles, had demanded admiſſion to their freedom, and having been refuſed, tendered their votes for Mr. Coke.

It

(1) In the arguments of the counſel on both ſides, as well as in the minutes of the evidence, I find this number ſometimes reckoned 27, and ſometimes only 26. The reader will perceive, that this inaccuracy is not of the ſmalleſt conſequence.

It was admitted, on both ſides, that the corporation is in *poſſeſſion* of the power of beſtowing the freedom of the borough, either by purchaſe or favour, on perſons who have no antecedent titles. Freemen, ſo admitted, are called honorary. The votes of the honorary freemen were objected to at the poll, on the part of Mr. Coke, and, in the interval between the election and the trial of the cauſe, application was made to the court of King's Bench, for *informations, in the nature of quo warrantos*, againſt the honorary freemen, but the court having thought, that ſufficient matter was not laid before them in the affidavits, to juſtify them in granting informations, they were refuſed (A). The counſel for the petitioners did not, therefore, queſtion the votes of the honorary freemen before the Committee. Of thit claſs, votes had been received on the poll, as well for Mr. Coke as for Mr. Giſborne, under Coke's general proteſt againſt them.

It was alſo admitted, on both ſides, That the previous rights, which give a title to demand the burgeſſhip of Derby are,

1. To be the ſon of a burgeſs, born after the admiſſion of the father to his freedom, and to be reſident in the borough at the time of the demand.

2. To have ſerved an apprenticeſhip of ſeven years to a freeman, and to be reſident, in like manner, at the time of the demand.

A queſtion aroſe, about the reſidence of the maſter, neceſſary to the acquiſition of this ſpecies of title, which ſhall be taken notice of afterwards.

The counſel for the petitioners alleged, that the 27, whoſe votes they meant to eſtabliſh, were poſſeſſed of inchoate rights, either by birth or ſervitude, and that, before the election, they had demanded to be admitted in the regular manner, by the perſons who, according to the conſtitution of the borough, are appointed to admit burgeſſes. That, having been refuſed by thoſe perſons, they ought to be conſidered by the Committee, as if they had been admitted, and that their votes ſhould be added to the poll.

On the other ſide the principle was admitted, but, ſuppoſing thoſe perſons poſſeſſed of antecedent rights, the fact of their having demanded their admiſſion of the proper

proper perſons, or in the proper manner, was denied.

The counſel for the petitioners ſaid, that by the expreſs proviſion of the charter, the perſons appointed to admit freemen are, the mayor and three aldermen, and that the perſons who had been refuſed, had demanded of the mayor and three aldermen to admit them.—On the part of Mr. Giſborne it was denied, that this was the legal mode of admiſſion, or that there was any proviſion to eſtabliſh ſuch mode in the charter.

The original charter being produced, this point was ſeparately argued and determined.

That part of the charter by which, according to the counſel for the petitioners, the manner of admiſſion for which they contended is eſtabliſhed, is as follows:

" (1) *Et ulterius volumus, ac, per præſentes, pro nobis,* " *hæredibus & ſucceſſoribus noſtris, ordinamus, et firmiter* " *injungendo præcipimus, quod major, aldermanni, confra* " *tres, communes conſiliarii, recordator, & communis clericus,* " *et omnes alii officiarii & miniſtri noſtri burgi prædicti, vir-* " *tute et ſecundum tenorem harum literarum noſtrarum pa-* " *tentium facti ſive conſtituti, ſeu in poſterum nominandi, eli-* " *gendi ſeu conſtituendi, antequam ipſi, ſeu eorum aliquis vel* " *aliqui, ad executionem ſive exercitationem officii, ſive offici-* " *orum, loci, vel locorum, cui vel quibus ſic reſpective nomi-* " *nati, appunctuati, ſive conſtituti ſint vel fuerint; admit-* " *tantur, aut aliqualiter in ea parte intromittant, ſive eorum* " *aliquis reſpective intromittat* (2), *tam ſacra corporalia, vo-* " *cata* THE OATHES OF ALLEGIANCE AND SUPREMA- " CY, *ac omnia alia ſacra per ſtatuta hujus regni noſtri An-* " *gliæ pro talibus officiariis & perſonis appunctuata, ſuper* " *ſacroſanctis Dei evangeliis præſtabunt, quam omnes decla-* " *rationes et ſubſcriptiones, in aliquibus ſtatutis pro hujuſmo-* " *di officiariis & perſonis prædictis ſimiliter appunctuatas,* " *facient & ſubſcribent, & quilibet eorum præſtabit, faciet,* " *et ſubſcribet, coram tali perſonâ vel talibus perſonis,* (3) " QUABUS ET QUÆ *ad hujuſmodi ſacra, declarationes, et* *ſub-*

(1) This, and the foregoing clauſe, were tranſcribed from an examined copy. The original is preſerved in the chapel of the Rolls.

(2) In the copy, *intromittant.*

(3) *Quær.* In the copy, *quab & que.*

" *ſubſcriptiones dandas & præſtandas per præſentes, vel per*
" *ſtatuta hujus regni noſtri Angliæ, ad præſentem vel impoſ-*
" *terum, appunctuatæ & deſignatæ ſint* (1), FUIT, *vel fue-*
" *rint. Proviſo etiam, et volumus, quod quælibet perſona*
" *de cetero* IN LIBERTAT. *burgi prædicti admittenda, ante*
[quam (2)] *admiſſionem ſuam* (3), *ſeparalia ſacramenta ſu-*
" *perius ultimo mentionata, quam declarationes et ſubſcripti-*
" *ones prædictas, preſtabit, faciet, & ſubſcribet, coram*
" *majore & aldermannis burgi prædicti pro tempore exiſten-*
" *tibus,* VEL QUATUOR EORUM; *quibus quidem majori &*
" *aldermannis, vel quatuor eorum, plenam proteſtatem & au-*
" *thoritatem ad ſacra prædicta danda et adminiſtranda damus*
" *et concedimus.*"

When the original charter was produced by one of the agents, the counſel for the ſitting member deſired that he might be ſworn, and aſked from whence he had brought it; but on the part of the petitioners it was ſaid, and agreed on all hands, that, indeed, with regard to *a common deed* when it is more than thirty years old, the law not requiring that the ſubſcribing witneſſes ſhould be produced to prove the execution, the perſon producing the deed muſt be ſworn, and muſt prove that it was taken out of the proper repoſitory; but that *charters*, and all inſtruments under the great ſeal, prove themſelves, and that, with regard to them, no collateral evidence is required to prove their authority.

The counſel for the petitioners contended,

That the mode of admiſſion is clearly and explicitly chalked out by the words juſt ſtated from the charter, *viz.* That admiſſions are to be by the mayor and three aldermen, and that this being ſo, any contrary uſage or bye-laws which the counſel on the other ſide might prove, would be illegal, and therefore ought not to be attended to by the Committee. That it was a known and undeniable rule of law, that no uſage, however conſtant and reaſonable, nor any bye-law, can be of force to alter the poſitive directions of a charter. That among numberleſs other caſes, that of Helleſton was in point to prove this doctrine, the court of King's Bench having, in that caſe, determined, that an uſage

(1) *Quær.* So in the copy.
(2) So in the copy.
(3) "*tam,*" it would ſeem, is omitted here.

uſage, contrary to the charter, although it had been eſtabliſhed for above two centuries, was void (1).

On the other ſide, this rule was not denied; but it was inſiſted upon, that it did not apply to the preſent caſe; for that, in truth, nothing was ſaid about the mode of admitting burgeſſes in the clauſe of the charter relied upon by the petitioners. That all that the *proviſo* in that clauſe preſcribes is, that every perſon, *before* ("*antequam*" being clearly written by miſtake inſtead of "*ante*") his admiſſion to the freedom of the borough, ſhould take the oaths of allegiance and ſupremacy, and other parliamentary oaths, before the mayor and three aldermen. That, from the obvious ſenſe of theſe words, it is plain that the adminiſtration of thoſe parliamentary oaths is a ſtep to be taken *previous* to the admiſſion, and that the admiſſion is ſomething diſtinct from this. That the intention and meaning of the charter is, that, by taking thoſe oaths, perſons who are to be admitted ſhould firſt prove themſelves to be loyal ſubjects, and proper and ſafe perſons to be received to the freedom of the borough. That, by the foregoing part of the clauſe, the ſame parliamentary oaths are required to be taken by the principal officers of the corporation; but that, whereas *they* are to take them before the county magiſtrates, who by the ſtatutes are commanded to adminiſter ſuch oaths, the mayor and three aldermen are empowered to adminiſter them to perſons who claim the freedom of the borough. That the reaſon of the proviſion evidently is, to relieve tradeſmen and mechanics, who are the ſort of perſons moſt likely to make ſuch claim, from the inconvenience and expence of leaving their home, to take the oaths in queſtion before the perſons appointed by the ſtatutes to adminiſter them. That thoſe oaths are very different from the corporate oath of office which burgeſſes muſt take on their admiſſion to the freedom of a borough. That the charter of Charles II. not having ſaid any thing about the mode of admiſſion, that mode muſt be diſcovered by the general law of corporations, or by ſome prior charter, or conſtant uſage, which is proof of a prior charter which once exiſted. That by the law of corporations, every act which concerns or affects the intereſts of the whole body, muſt be done in a general corporate aſſembly of the whole, unleſs where, by the expreſs proviſions of a charter, or by preſcriptive uſage a par-

(1) *Vide ſupra*, vol. ii. Caſe of Helleſton, p. 2.

a partial number are empowered to do ſuch acts. That the admiſſion of a perſon to the freedom of the corporation is an act of this kind; and, that, as the charter of Charles II. had been ſhewn to have made no proviſion on this ſubject, if there were no eſtabliſhed uſage to confine the power to a certain number, no admiſſion to the freedom of Derby could be valid, unleſs at a general corporate meeting. That, however, there was no occaſion to recur to the general law of corporations; for that it could be proved that, as far back as evidence goes, and down to the year 1772, the conſtant uſage of this borough had been to admit freemen at what is called a *common hall*; which is a meeting conſiſting of not leſs than 20 members of the common-council, of which 20 the mayor muſt be one. That, till 1772, no admiſſions were ever known to have been made by a mayor and three aldermen only, or at any meeting but a common hall.

The counſel for the petitioners inſiſted,

That, if the Committee ſhould think the words of the charter ſufficiently explicit as to the mode of admiſſion, the counſel on the other ſide could not be permitted to give any evidence, either of uſage or bye-laws, to contradict it. But that, if the court ſhould be of a contrary opinion, and if the ſitting member's counſel ſhould be allowed to prove, and ſhould prove, the regular mode of admiſſion to be otherwiſe than before a mayor and three aldermen; yet they would ſtill contend that, under all the circumſtances of the caſe, the application and demand of the rejected voters had been ſuch as ought to induce the Committee to put them upon the poll.

The court being cleared, the Committee deliberated for ſome time, and then the counſel being called in, they were informed by the Chairman, that the Committee had come to the following reſolution, *viz.*

Reſolved, "That the clauſes in the charter, which "have been produced to the Committee, have not ſo eſta-"bliſhed the mode of admiſſion of the freemen of this bo-"rough as to exclude other evidence."

After the Committee had come to this reſolution, what the counſel for the ſitting members had alledged was clearly proved, or admitted, *viz.*

That, until the year 1772, at far back as evidence goes, the uſage had been to admit freemen, whether *honorary* or by

by *title*, at a common hall only; and that an oath of office was then adminiſtered to the perſons admitted, different from the parliamentary oaths preſcribed by the charter. In confirmation of the evidence on this ſubject, a bye-law of the corporation was produced, made in the year 1743, which is as follows:

10 Dec. 1743. "For the better regulation of the ſwearing and admitting of thoſe who ſhall for the future claim their freedoms or burgeſſhips within this borough, and to prevent any impoſitions that may be occaſioned thereby; it is now ORDERED, that every perſon or perſons, who ſhall or may claim any ſuch right or freedom, as aforeſaid, do, and ſhall, before they or any of them are, or is admitted into the ſame, at ſome *common hall*, to be held in and for the ſaid borough, exhibit in writing their reſpective name and names, and how and in what manner they, or any of them, do ſeverally claim and derive their reſpective rights to ſuch freedoms or burgeſſhips, that the ſame, by a proper Committee of this corporation, may be enquired into or examined; and if found right and conſiſtent with the laws, orders, and rules of this corporation, ſuch perſon and perſons ſhall and may be ſworn and admitted a burgeſs and burgeſſes of this corporation, at the then next, or at ſome other ſucceeding *common hall*."

It appeared that, from the making of this bye-law, till 1772, the practice had been, for all perſons claiming to be admitted, to give in their claims at one common hall, and, if there was any doubt concerning their titles, they were not admitted till the next; but where their titles were unqueſtionable, they ſtill continued frequently to be admitted at the ſame common hall where they had made their claims.

In 1772, there was a conteſted election for Derby, on a vacancy occaſioned by the death of Mr. Fitzherbert. Thomas Eaton was mayor for that year, his mayoralty having commenced at Michaelmas, 1771; and he, from a miſapprehenſion of the ſtatute of 12 Geo. III. cap. 21, (giving coſts to perſons who, being entitled to their freedom in any borough, and having applied to the mayor, or other perſon, officer or officers, who hath or have authority to admit to ſuch freedom, and being refuſed, after proper notice, ſhall ſue out a *mandamus*, and in conſequence thereof be

admitted) thought himſelf entitled and bound to admit ſuch perſons, as had antecedent rights, and ſhould apply, without the concurrence or preſence of any other member of the corporation.—Accordingly, he admitted ſeveral at his own houſe; but this was ſoon diſcovered to be an illegal proceeding, and the perſons whom he had ſo admitted had the fees which they had paid returned to them, and did not, unleſs admitted again, attempt to exerciſe the right of voting, or any other franchiſe.

About this time, however, (*viz.* 1772.) the charter having been examined by ſome lawyer, he conſtrued the part of it which has been ſtated, to mean what the counſel for the petitioners had contended for on the preſent occaſion. In conſequence of his opinion, it was thenceforward, till about the time of the laſt election, univerſally underſtood by all parties in the borough, that the regular mode of admiſſion, as expreſsly preſcribed by the charter, was by the mayor and three aldermen. All admiſſions, therefore, of freemen having antecedent titles were, from thenceforth, made by the mayor and three aldermen. Some, indeed, were admitted at common halls, but then, as appeared from the books, there were always preſent the mayor and three aldermen, which is not neceſſary to conſtitute a common hall; any twenty members of the common council, the mayor being one, are ſufficient for that purpoſe. Honorary freemen ſtill continued to be elected and admitted only at common halls, but they are called by the mayor at his diſcretion. He ſends to the common clerk, who gives three days notice by his ſummons; the day of the delivery of ſuch ſummons being one.

The above circumſtances having been laid before the Committee, the counſel for the petitioners allowed that the legal mode of admitting freemen was not as they had at firſt imagined, and that it did not depend upon the clauſes in the charter on which they had relied, but that a common hall was, by the conſtitution of the borough, proved by uſage the only legal meeting for that purpoſe. They likewiſe admitted, that the perſons, who had applied and had been refuſed, had not applied to a common hall, nor required that a common hall ſhould be called, and that they could not be ſuppoſed to have had admiſſions by a common hall in their contemplation. But they contended, that thoſe perſons,—having applied to the mayor and three aldermen, according

to

to what was *univerſally* underſtood at *that time* to be the conſtitution of the borough, ---having applied to thoſe who were, at leaſt, the proper perſons to adminiſter the preliminary oaths, without which they could not complete their admiſſions,—having been promiſed their admiſſions,—put off from time to time,—and at laſt refuſed by the mayor, with a view to deprive them of their votes, (he knowing them to be in the intereſt of Mr. Coke,)—were entitled to be put upon the poll. Of this, they ſaid they would ſatisfy the Committee after the evidence on the ſubject ſhould be heard.

The counſel for the ſitting member objected to the admiſſion of any evidence to prove ſuch facts as the counſel on the other ſide had ſtated. They ſaid, that admitting (for argument's ſake) the facts to be true, ſtill they would be perfectly immaterial. That, as the common hall was now allowed to be the only legal meeting for the admiſſion of burgeſſes, it would be mere loſs of time to go into evidence to ſhew applications to another ſort of meeting for what that meeting had no right to do, and what, if it had done it, would have been void, and would have conferred on the claimants no right of voting, nor any other franchiſe. The utmoſt, they ſaid, which had ever been, or ever could be done, in caſes of this ſort, was, to allow the votes of perſons who, having clear titles to admiſſion, had applied agreeably to the eſtabliſhed law of the corporation, and had been refuſed. That if a man proceeds in a manner contrary to what is preſcribed, either by the general law of the land, or by any particular local law under which he acts, he muſt ſuffer for his ignorance, and cannot claim to be put in the ſame ſituation as if he had known the law, and had acted agreeably to it. That there are not two more eſtabliſhed maxims than, that ignorance of the law ſhall be no excuſe for departing from it, and that every man ſhall be conſidered as acquainted with the law, and, therefore, that thoſe who do not follow its directions ſhall not gain any advantage, to which, if they had followed them, they might have been entitled.

In anſwer to theſe and many other arguments, it was contended, that, although there are many caſes where perſons applying, within the preciſe and exact mode preſcribed by law, to be admitted to their franchiſe, and being refuſed, have been conſidered as if actually in poſſeſſion of it, yet it

does not follow from thoſe caſes, that all perſons who have *not* preciſely followed the ſtrict legal line, ſhall, in every inſtance, be conſidered as *not* entitled to their franchiſe. That, on the contrary, the principle of thoſe caſes extends much farther, being clearly this: That, where perſons entitled to any right do, *all in their power* to obtain poſſeſſion of it, and are prevented by the unfair partiality of another, they ſhall be permitted to exerciſe ſuch right, and ſhall not ſuffer by the injuſtice which was intended to have been done to them. That the Committee was a court of equity as well as of law; and that when they conſidered what was the univerſal opinion in this borough concerning the legal mode of admiſſion, at the time when the perſons in queſtion made their application, they would remember two maxims equally rational with thoſe alluded to on the other ſide, and ſo well eſtabliſhed as to have become in a manner proverbial, viz. "*Summum jus, ſumma injuria*," and "*Communis error facit jus.*" That the laſt ought, at leaſt, to weigh ſo far in the preſent caſe, as to excuſe the claimants for having choſen a mode of application, which, although not agreeable to the conſtitution, was according to the ſenſe, of the whole corporation.

In ſhort, the whole caſe, as afterwards *proved*, being *hypothetically*, the arguments on this previous queſtion, concerning the admiſſibility of the evidence, in a great meaſure anticipated thoſe which aroſe upon the facts after they were eſtabliſhed.

The court being cleared, after deliberation, the counſel were called in, and informed by the Chairman of the following reſolution.

Reſolved, "That the Committee are of opinion, that "the Counſel for the petitioners ſhall proceed on their evi-"dence."

Upon this they went into the evidence on the whole of their caſe, which conſiſted of two different parts, and had two diſtinct objects, *viz.*

I. To ſhow the nature and circumſtances of the application which the perſons, whoſe votes they meant to eſtabliſh, had made to be admitted to their freedom; and the different delays, and final refuſal, of the mayor to admit them before the election.

II. To ſubſtantiate the titles of thoſe perſons, by proving either their birth or ſervices as apprentices to have been ſuch

as,

as, by the cuſtom of the borough, gave them a right to demand their freedom.

I. The principal witneſſes on the firſt head, were Edward Wilmot, Eſq; barriſter at law; Mr. John Harriſon, ſurgeon, in Derby; Mr. John Harriſon, attorney; Thomas Eaton, alderman of Derby; William Merril Locket, town (or common) clerk; John Cook; and Chriſtopher Heath, Eſq; the mayor of Derby (B).

Mr. Wilmot ſaid, that, on the morning of the 5th of January, 1775, (about three weeks before the election) he went, with Mr. Coke the petitioner, and two or three other gentlemen, to the mayor's houſe. That Mr. Coke told the mayor, that he had come to give him the trouble of admitting him to his freedom. That the mayor, after ſome converſation, ſaid, "If you wiſh to be admitted now, "(or "ſworn," for he could not ſay which of theſe words was uſed) "we will do what we can to accommodate you, "or get more members." That of the magiſtrates, beſides the mayor, only John Heath, an alderman, and brother to the mayor, was then preſent. That *they* ſent for Mr. Flint, and Mr Bingham, two aldermen, who came; and that the mayor then ſaid, "Now, Sir, we will ſwear "you in." That they gave Mr. Coke the book; but that, before they began to ſwear him, Flint ſaid, "If we "admit (or ſwear) you, I apprehend there are a great "many will inſiſt on the ſame." That Mr. Coke replied, "'Tis true, there are;" on which the mayor, or his brother, ſaid, "If that is the caſe, you muſt excuſe our ad-"mitting (or ſwearing) you now." That Mr. Coke ſaid, "Mr. mayor, you muſt uſe your diſcretion; but I muſt "deſire you will call a *meeting*, or *hall*." That he did not recollect which of thoſe two words Mr. Coke uſed. That the mayor anſwered, that he had no objection; and that he would endeavour to get a ſufficient number by the afternoon. That, in the courſe of the day, they received a meſſage from the mayor, informing them, that he had got a ſufficient number of aldermen to attend; and appointing them to come to one of the rooms of the town-hall, at a certain hour in the afternoon. That, at the hour fixed, he, and Harriſon, the ſurgeon, went to the hall, but without Mr. Coke, and that they found the mayor, Flint, Bingham, and Mr. Wylde, an alderman; and

that

that Mr. Edwards, another alderman, and Mr. Grainger (who was ſteward of the corporation), came in. That the witneſs, and Harriſon, went by the deſire of Mr. Coke; and that they told the mayor, that they came to ſee that proper tender was made by thoſe who claimed their freedom. That Grainger, with much warmth, objected to their being preſent, not being members of the corporation; but that, on an appeal to the town clerk, he decided, that they might ſtay. That ſeveral claimants came in, and tendered the evidence of their titles, *viz.* thoſe who claimed by apprenticeſhip, their indentures, and thoſe who claimed as ſons of freemen, certificates of their birth. He then ſpecified, by name, 25 of the 27, who all produced either indentures or certificates. He ſaid that he having ſatisfied thoſe perſons that their documents would be ſafe in the hands of the mayor, they were all put up in a bundle, and delivered to the mayor, who ſaid that in the mean time he would look into their claims, between that day and Monday next. That he could not undertake to aſſert, that the mayor ſaid he would *admit* them on Monday. That, on Monday the 9th, the mayor, and Mr. Crompton, alderman, and Flint and Bingham, attended. That ſeveral new perſons then tendered their evidence. That ſome of thoſe who had appeared on the 5th, attended again on the 9th, but he could not ſay, whether they tendered the proofs of their titles on that occaſion (1). That, at that time, the mayor and aldermen admitted 3 or 4 perſons who had claimed a conſiderable time before, but none who had claimed on the 5th. He ſpecified a perſon who claimed, for the firſt time, on the 9th, and who produced his certificate. He ſaid that, when application was made to admit certain claimants who tendered evidence of their right, the mayor, and Crompton declared, it was too late in the morning, and ſaid, "We have other buſineſs "to do, and therefore we will give you our honours, that "we will meet again on the next Monday, and ſwear in "(or admit) all thoſe who ſhall make out their rights." That the mayor deſired they might meet an hour ſooner than the uſual time, which is 11 o'clock, becauſe there would be a great many to be admitted; and that 10 o'clock

was

(1) *Quære?*

was fixed upon. That, on the 16th, he (the witneſs) went, at the hour appointed; and that other claimants, beſides thoſe who had applied before, attended; but that the mayor did not come, nor any of the aldermen. That he ſaw the mayor about 11 that morning, at the market-place, and aſked him, if he would not come to the hall? to which he anſwered, No, he ſhould not, for he found he had been deceived (or miſled) about ſome of the claims, the time before; and that he was come to a reſolution not to admit (or ſwear in) any more before the election.

Being croſs-examined, he ſaid, He did not know or hear of any of the claimants offering *witneſſes* to prove the execution of their indentures, or that they had ſerved their time; or, that thoſe claiming by birth produced any other evidence than a certificate, *i. e.* a copy of the regiſter. That, if witneſſes had attended, he thought he muſt have noted it.

He ſaid, on his re-examination, that, when the indentures and certificates were produced, the mayor did not expreſs any doubts or difficulties, or aſk for any other evidence, or ſay that any thing more was neceſſary.

John Harriſon, ſurgeon, proved nearly the ſame facts with Mr. Wilmot. He ſaid, that in the altercation with Grainger, he (Grainger) ſaid, it was not cuſtomary to have any one preſent at their meetings but themſelves, and that the only proper evidence was the corporation-books. That Mr. Wilmot aſked him how a *mandamus* could be ſupported, without witneſſes to prove the tender; and that, on the reference to the town-clerk, *he* ſaid it was undoubtedly neceſſary to have witneſſes. That, upon this, the mayor agreed to take the tender of the different claimants. Theſe he ſpecified by name as Wilmot had done. He ſaid, That the mayor deſired the indentures and certificates might be left with him, and that he (the witneſs) and Wilmot, engaged, to ſome who expreſſed doubts about entruſting them with him, that they would be ſafely returned. That the mayor ſaid, he deſired to have them, to enquire into the claims, and wanted to appoint a future day for their admiſſion; that they ſhould have a meeting again on the Monday following, and deſired they would then attend. That, on the 9th, he, together with Wilmot and John Harriſon the attorney, attended. That, at that time, ſeveral people claimed.

That

That (1) ſix were ſworn, who had tendered about a month before. That two of thoſe who had claimed on the 5th were in the room, and again deſired to be admitted; and that all the others, whom he had named as claiming on the 5th, were then attending at the outſide of the door. That they were deſirous of coming into the room, but that he deſired they would not. That the mayor ſaid, he had ſome particular buſineſs to tranſact that morning, which made it inconvenient to admit them then, and deſired they might attend on the Monday following; and that Wilmot, Harriſon the attorney, and he (the witneſs) would attend with them. That ten o'clock was the hour fixed. That the two claimants who were in the room, and who had before attended on the 5th, ſaid, it was hard there ſhould be ſo much trouble in coming again; and that the mayor and Crompton told them, "Gentlemen, you may depend upon "it, you ſhall all be admitted, who have a right, on "Monday next; we give you our honours, you ſhall be "admitted." That they ſtill preſſing to be admitted at that time, the mayor and Crompton laid their hands upon their breaſts, and ſaid, "Do you doubt our honours? "We give you our honours, you ſhall be admitted." That, upon this, Wilmot and Harriſon the attorney left the room, and that, as the witneſs was at the door going out, the mayor called to him, and ſaid, "We ſhall now "have proper time to examine into the claims, and thoſe "who we find have a right ſhall be *properly* admitted, on "Monday." He ſaid, that he (the witneſs) did not attend at the hall on the 16th. That he was going there, but that he ſaw the mayor canvaſſing with Mr. Giſborne. That he ſaw him in different parts of the town with Mr. Giſborne, both on that, and on the following day.

Being croſs examined, as to the nature of the evidence of titles offered by the claimants, he ſaid. That the certificates of birth were ſigned by the perſons who kept the regiſter, That there was no other evidence of *birth*; but that they looked in the corporation-books, for the admiſſions of the fathers. That there was no evidence of apprenticeſhips but the indentures; no evidence being produced of the execution, or of the actual ſervice.

On

(1) Mr. Wilmot ſaid, "three or four." *ſupra*, p. 151.

On his re-examination, he ſaid, that there was not, on the part of any one, any objection made, or any doubt ſuggeſted about the ſufficiency of this evidence; and that the ſix who were admitted on the 9th, produced no other ſort of evidence. That the oaths of allegiance and ſupremacy were adminiſtered to them, and, he believed, ſome other oaths. That ſome of them polled at the election, and no objection was made to their votes.

Both Wilmot and he agreed, that the claimants who were refuſed, had no idea of being admitted by any other perſons than the mayor, and three aldermen.

It was proved, that 21 of the perſons, who claimed on the 5th, 9th, and 16th, were admitted after the election, on the 1ſt of February, at a common hall; and the laſt witneſs ſaid, that the 21 made no application for the common hall, but that it was advertiſed by the mayor, about the day of the election.

John Harriſon, attorney, proved exactly the ſame facts with the former witneſs, as to what paſſed on the 9th; and ſpecified, as he had done, the names of thoſe who then attended to be admitted. He ſaid, That he went out and told them what the mayor and Crompton had promiſed, and deſired them to attend accordingly. That, on the 16th, he went round to thoſe perſons, and deſired them to come, and that he believed they were all at the hall by 10 o'clock. That he himſelf went at that time, and that, after waiting half an hour, he was told that the mayor was canvaſſing with Mr. Giſborne. That he went to him, and found him canvaſſing with him, and one or two of the Lords Cavendiſh (who were admitted to have been active friends of Giſborne). That he beckoned to him to croſs the ſtreet to him, which he did. That he told him, the hour he had appointed for ſwearing in the burgeſſes was come, and aſked him, how ſoon he intended to go to the hall? That the mayor told him, he ſhould go at 11 o'clock, about other buſineſs; but ſhould not ſwear in any burgeſſes that day. That he aſked him if he remembered the promiſe he had made on the preceding Monday; and he ſaid he did, but he had been deceived in ſwearing in ſome of the ſix, on the 9th, who had no right. That he (the witneſs) anſwered, that he knew nothing of *their* rights, but that this was no excuſe for his not going to the hall, and ſwearing in the others; that he had ſaid he would examine

amine into their rights, in the courſe of the week, and if he had done ſo, he could not be deceived as to *them*. That the mayor replied, that it did not ſignify, for that he *could* not (or *would* not, he did not recollect which) ſwear in any burgeſſes before the election. That, upon this, he informed the claimants, that they need not ſtay longer, the mayor having declared that he would not ſwear them in.

On his croſs-examination, he ſaid, That when the mayor promiſed they ſhould be admitted, he had no doubt, but that it was meant, that they ſhould be admitted by the mayor and three aldermen.

It appeared from his teſtimony, and that of the former witneſſes, that many others, beſides thoſe whoſe votes were now attempted to be ſubſtantiated, applied to be admitted. He ſaid, that, he thought, about 60, altogether, claimed on the 9th.

Thomas Eaton, alderman, (and the perſon already mentioned to have been mayor from Michaelmas, 1771, to Michaelmas, 1772) ſaid, He was about 60 years of age. That he had been converſant about the buſineſs of the corporation for nine and twenty years, except the laſt three years, and that he had generally attended the admiſſion of burgeſſes. That the evidence which perſons claiming by birth uſually produced, was a certificate, *i. e.* a copy of the regiſter, ſigned by the perſon who kept the regiſter; or, if they were diſſenters, that they commonly brought a book, in which their births were entered by their own parents; and that this was the only evidence required. That perſons claiming by ſervice, always brought their indentures, and ſometimes the maſters came with them. That it was not the practice to produce the ſubſcribing witneſſes. That he had known perſons rejected, becauſe the duty on the indentures had not been paid. That, when there was any thing doubtful, the indenture was left to be enquired into, with Mr. Grainger, or ſome other member of the corporation.

William Merril Locket, attorney, (the town-clerk) ſaid, as to the evidence uſually produced by perſons claiming to be admitted, That the certificate, and both parts of an indenture, had been generally underſtood to be ſufficient. That, if any doubt aroſe, time was taken to enquire; which was done in the town, within a few days, or a week.

week. That, when perſons claimed by birth, the books uſed to be examined, to ſee whether, and when, the father had been admitted. That, if any *doubt* aroſe on a claim by ſervice, they ſometimes called for a ſubſcribing witneſs; and that, in all caſes where there were doubts, the admiſſions were put off till they were cleared up. He ſaid, that he was preſent at the meeting on the 5th, but not on the 9th.

On producing one of the corporation-books, it appeared by the liſts, that 92 perſons in all had claimed to be admitted on thoſe two laſt mentioned days: and, by another book it appeared, that, of thoſe 92, 65 had again applied, at two common halls holden ſince the election, *viz.* one on the 1ſt, and another on the 15th, of February; and that, of the 65 thus applying a ſecond time, 27 had been admitted at thoſe two common halls, and 33 rejected.

Cook, (and one Smith) were called to ſhew, that Heath, the mayor, was to be conſidered as an agent for Mr. Giſborne.

Cook ſaid, That, at a public houſe in Derby, about a week before the election, the mayor, in the preſence of the landlord and landlady, aſked him for his vote in favour of Giſborne. That he replied, he muſt ſtudy his own intereſt, and that they, (the corporation) had never conſidered his father, nor any of his family, in the diſtribution of the charity-money (which is lent out to trade's-people in Derby without intereſt). That the mayor ſaid, he would not promiſe any of the money, but that after the election ſhould be over, there would be ſome of that money to be diſpoſed of, and they ſhould certainly think of thoſe who ſerved them, and not of thoſe who went againſt them; and deſired him to ſtudy his own intereſt.

It was proved by Smith, and admitted on the part of Mr. Giſborne, that the mayor had ſigned a paper requeſting him (Giſborne) to become a candidate.

Mr. Heath, the mayor, agreed with the other witneſſes in the material circumſtances of what paſſed on the 5th, 9th, and 16th. He ſaid, That the admiſſions were adjourned on account of the great number of claimants, and becauſe they were not prepared with people to aſſiſt them. That, at the ſolicitation of Coke's friends, they admitted

ſix

ſix on the 9th. That he did not think they examined the claims of any others. That the evidence produced by the ſix, conſiſted of indentures and certificates. That upon theſe there were doubts, but that Harriſon, the ſurgeon, ſaying, "You may be ſure they have a right," or to that effect, they admitted them. That it had not been uſual to require other evidence, unleſs where a doubt aroſe. That it was found out after the ſix were admitted, that the mayor and aldermen had been impoſed upon; for that ſome of them had no right, and that two in particular were non-reſident. That he was told of this on the 9th as he came out of the hall, and that it was for this reaſon, and becauſe there was a great noiſe and tumult in the town, that he did not keep his word about the meeting on the 16th. That it might be on the 9th that he came to this reſolution of not meeting on the 16th; but that he did not communicate it to the perſons whom he promiſed to meet on that day, not thinking it worth his while to ſay any thing about it. That meſſages were ſent to him, that if he would ſwear in certain perſons, they would vote for Giſborne. That Flint, the alderman, brought ſuch a meſſage. That, however, it did ſtrike him that, notwithſtanding this promiſe, they *might* not vote for Mr. Giſborne. That his general anſwer was, that, if any were admitted on the eve of the election, it might be thought partial. That they were apprehenſive of a riot by Mr. Coke's party, if they had gone to ſwear in burgeſſes, and had not admitted all who claimed, whether they had a right or not. That he canvaſſed twice or thrice for Giſborne, and met with no inſult. That, if there had been no miſtake about the ſix, he would not have admitted any more, without calling a common hall to his aſſiſtance, becauſe of the extraordinary numbers that applied; but that the impoſition relative to the ſix confirmed him in that reſolution. That, ſome time after the 9th, and before the 16th, he reſolved, without having concerted it with any body, to call a common hall, becauſe he thought the old mode of proceeding was the beſt; but that it was not diſcovered or ſuſpected before the election, that the mayor and three aldermen could not admit; and that, therefore, this was not any of his reaſons for not meeting on the 16th.

That

That, at the common hall on the 2d (1) of February, after the election, he was attended by a counſel. That a ſtricter mode of proof, as to the titles of the claimants, was then inſiſted on, than had been uſual on former occaſions, and that, by the counſel's advice, ſubſcribing witneſſes were required to prove the execution of the indenture. He ſaid, that the ſame counſel who attended him on the 2d of February, attended alſo as his counſel at the election. That an agent of Mr. Wenman Coke's repaid him the fees he had given the counſel. That Mr. Wenman Coke acted as an agent for Giſborne, but that he did not believe the money was Mr. Giſborne's. That Mr. Grainger, the corporation-ſteward, paid for the counſel's attendance on the 2d of February, and that he believed it was paid on the account of the corporation. That he ſaw ſome of the Lords Cavendiſh on the 16th, and, perhaps, on the 15th. That they had, among other things, converſed about the election. That there might be ſome ſuch converſation as that if ſome of the claimants voted it might endanger the election, but that he remembered no particulars of any converſation, and did not recollect that any of them (the Lords Cavendiſh) recommended that the claimants ſhould not be admitted.—He ſaid, on ſeeing the witneſs Cook, that he did not know him perſonally, but that he recollected him, and believed he ſaw him at a public houſe at the time he had mentioned. That Cook was talking about voting and town's-money, but that he (the mayor) did not recollect having ſaid, "We ſhall remember our friends," or to that purpoſe, and that, if he had ſaid ſo, he ſhould have recollected it. That he had ſome converſation with Cook about the town's or charity-money, but could not pretend to ſay what had paſſed on that ſubject.

The following order, made at the common hall holden on the 1ſt of February, the 2d day after the election, was read, from the hall-book.

"Common hall, 1. Feb. 1775. Before Chriſtopher "Heath, Eſq; mayor, &c.

"Ordered, at this common hall, That Mr. mayor be "indemnified from all expences that ſhall or may accrue, "for

(1) The mayor was miſtaken in the day, the common hall in queſtion having been held on the 1ſt.

" for, or by reaſon of, his refuſing to admit any perſon " or perſons to be burgeſſes of this borough, and from all " coſts and charges that ſhall or may fall upon him " relative to the execution of his office in the late " election."

II. To ſubſtantiate the titles of the claimants, which was the object of the ſecond part of the evidence propoſed to be given on the part of the petitioners, the indentures and examined copies of the regiſter, according to the nature of the ſeveral titles, were produced to the Committee. The reſidence of the claimants at the time of their claim, and of their fathers or maſters, and the admiſſions of their fathers or maſters before the birth or apprenticeſhip, were proved; as well as the execution of the indentures, the actual ſervice, and that the claimants were of age when they applied for admiſſion.

The counſel for the ſitting member did not controvert the ſufficiency of the proof brought to eſtabliſh the titles; except with regard to ſeven voters, *viz.* John Wedgewood, Thomas Bilſon, Charles Clarke, Thomas Hancock, William Mattocks, Thomas Jones and William Sale.

1. The indenture of John Wedgewood was produced, the execution and ſervice were admitted, and his reſidence at the time of the claim was proved. To prove his age, an examined copy of the entry in the pariſh regiſter was produced, by which the date of his baptiſm appeared to be the 18th of March 1753; ſo that he was of age in the month of March previous to his claiming admiſſion. But, in this entry, the name was written *Wedgeworth*. To ſhow that this was a miſtake, the pariſh-clerk of St. Peter's pariſh was called, who had been in that office before and during the year 1753, and ever ſince. He produced his minute-book, where, in the entry correſponding to that in the regiſter, the name was *Wedgewood*. He ſaid, that he always entered the baptiſms in that book before they were entered in the regiſter, and that the book had always been in his cuſtody. It appeared, on inſpection, that there had been an eraſure of the laſt part of the word; and though he at firſt denied all recollection of it, and ſaid he had never made any alteration in the book, the counſel for the ſitting member, by croſs examination, extorted from him a confeſſion, that, ſome time before the election, John Wedgewood,

wood, and another perſon whom he did not know, came to him to demand a certificate. That Wedgewood ſaid he wanted it for the purpoſe of being admitted, and of being a voter. That he told him his name was wrong in the book, and that he (the clerk) at his deſire altered it to *Wedgewood*. Other witneſſes, however, ſaid, that they knew John Wedgewood; that his father's name was William Wedgewood; that he lived in St. Peter's pariſh; that John Wedgewood was apprentice to the perſon to whom he appeared by the indenture to have been bound, and that he was about 22 years of age or more. No attempt was made to prove, nor was it ſuggeſted, that there exiſted any ſuch perſon as *John Wedgeworth*. John Wedgewood was admitted a burgeſs, after the election.

2. Thomas Bilſon had been refuſed his admiſſion at the common hall on the 1ſt of February, becauſe on the back of his indenture, there was an indorſement that the maſter ſhould allow him for his board; the mayor ſaying it was not a regular indenture. It was proved, by a fellow-apprentice, that he had ſerved all his time with his maſter, and the maſter's admiſſion was alſo proved. The maſter was dead at the time of the trial.

3. Charles Clarke's indenture was produced. His maſter was dead. John Harriſon the ſurgeon ſwore; that he *believed* he had ſerved his time out; that he (the witneſs) was abſent from Derby for about a year during the time of Clarke's apprenticeſhip,; that, when he left the town, Clarke was with his maſter; and that he found him with him on his return.

4. and 5. Thomas Hancock and William Mattocks claimed alſo by ſervitude. Their indentures, ſervice, and reſidence were proved; but it appeared that they were bound to a partnerſhip of three perſons, *viz.* two of the name of Hancock, and one William Goodman. That, of the three, Goodman only was a burgeſs. That the other two had reſided all the time of the ſervice of the two apprentices. That Goodman the burgeſs was alſo reſident in Derby when they were bound, and reſided there the firſt five years of the ſeven; but that he then left the town, and was not a reſident burgeſs during the *whole* time of their ſervice. That the trade was carried on in Derby in the name of Goodman

man and Hancocks, and that all the three had a ſhare in the profits.

To prove that the reſidence of the maſter, (who muſt be a burgeſs) during the *whole* apprenticeſhip, is neceſſary, the following entry in one of the corporation-books was produced and read.

10th Nov. 1701. "At this common hall, it is reſolved "and agreed, by all the perſons preſent, *(nem. con.)* that "it hath heretofore conſtantly been the cuſtom, and ſo re- "mains at this time, that no perſon or perſons whatſoever "ought to be admitted and ſworn a burgeſs or burgeſſes, "freeman or freemen, of this borough, unleſs ſuch perſon "or perſons be of the age of 21 years; or unleſs he or "they be born after his or their father or fathers was or "were ſworn a burgeſs or burgeſſes of this borough; or un- "leſs he or they have ſerved as apprentice or apprentices "*to ſome burgeſs or burgeſſes dwelling in this borough, by the* "*the ſpace of ſeven years*; or unleſs ſuch perſon or perſons "be dwelling and reſident in the borough at the time of "ſuch his or their admittance or admittances; nor ought "any perſon or perſons to be ſworn a burgeſs as aforeſaid, "that hath ſerved as an apprentice to any foreigner, or "clandeſtinely to any burgeſs, in this borough; nor any "perſon or perſons that is, or are, or ſhall be born out of "this borough, although his or their father or fathers was "or were then burgeſſes of this borough (1)."

6. With regard to Thomas Jones, the circumſtances were theſe. A general notice had been ſerved on the mayor, to produce the *indentures* which, at the time of the applications for admiſſion, had been left in his hands. He had not produced the indenture of Jones, but the petitioners had a duplicate of it, which they produced. It appeared that he had been bound to one Holmes; and Henry Cawley being called to prove his actual ſervice, ſaid that Holmes had aſſigned him to his (Cawley's father,) and that he had ſerved the whole ſeven years to him. Harriſon, the ſurgeon, ſwore that he ſaw both the indenture and aſſignment, or turn-over, delivered to the mayor. That, in the minutes he took at the time, it was mentioned thus: "Thomas Jones—an "indenture,

(1) *Vide* the caſe of Green, *v.* the corporation of Durham, 1 Burrow, 127.

"indenture, and turn over, from Holmes to Cawley."---That he could not ſay whether the turn-over was written on the indenture, or was a detached inſtrument.

The counſel for the ſitting member inſiſted, that ſuch aſſignment could not be proved by parole evidence. That, to entitle the counſel on the other ſide to offer ſuch evidence, it was not ſufficient to ſay that the aſſignment had been delivered to the mayor and he had not produced it. That it muſt alſo be ſhewn, that he had received notice to produce it. That a notice to produce the indenture did not imply a notice to produce the aſſignment or turn-over, which, for any thing that appeared to the contrary, was a ſeparate inſtrument.

On the other ſide it was contended, that the notice was ſufficiently comprehenſive, and plainly muſt have been underſtood by the mayor as extending to all the muniments delivered to him by the claimants, as evidence of their titles.

The Committee over-ruled the objection, and all the circumſtances neceſſary to eſtabliſh the title of Jones, were proved.

7. William Sale was not *poſitively* ſworn to have ſerved above 5 years.

Theſe 6 laſt, *viz.* Bilſon, Clarke, Hancock, Mattocks, Jones, and Sale, were not admitted to their freedom after the election.

It appeared that the titles of many of the 27 had accrued 10, 20, 30, or 40 years ago. It was admitted that all the 27 had tendered their votes at the election, for Mr. Coke. It was alſo agreed, that many perſons, who had been admitted to their freedom, by the mayor and 3 aldermen, had voted at the election; but that, of perſons of this deſcription, the numbers for each candidate were equal; *viz.* 45 for each.

COUNSEL for the petitioners.

It is not contended, that, where the right of voting is in burgeſſes or freemen, it is, in every caſe, neceſſary, that a perſon, in order to be entitled to vote for a member of Parliament, ſhould be actually inveſted with his freedom by

admiſſion. It is, on the contrary, allowed, that there are caſes where perſons entitled to their freedom, although they have not been actually admitted, have a right to vote. But it is ſaid, that ſuch caſes are only thoſe, where the perſons entitled have applied in *ſtrict form* to thoſe who, by the law of the place, are empowered to admit, have offered to produce legal evidence of their titles, and have been refuſed. The perſons who have now proved before the Committee their titles to their freedom, applied to the mayor and 3 aldermen; whereas, by the conſtitution of Derby, the admiſſion of freemen belongs to a meeting of 20 members of the corporation, called a common hall. Their application, therefore, it is ſaid, was not regular, nor made to the proper perſons; and, on that account, their votes ought not to be allowed. But (to repeat what was ſaid already upon the queſtion concerning the admiſſibility of the evidence which has now been produced) the ſtrict rule contended for, is not eſtabliſhed by any *dictum* or precedent. The determinations referred to only ſhow that, where there has been an application ſtrictly regular, the votes are bad. The principle of thoſe determinations is, that perſons, who, having titles, apply and are refuſed, have an equitable right to their freedom; and this principle is clearly applicable to the preſent inſtance. The perſons in queſtion applied to thoſe, who according to the univerſal belief of every body in the borough, were empowered to admit them. They applied to the mayor, who is the head of the corporation. He promiſed on his honour, that they ſhould be *properly* admitted. If the mayor, at that time, *did not* know the proper mode of admiſſion, are they to ſuffer for not knowing more of the conſtitution of the borough than its chief magiſtrate? If he *did* know it, it was his duty to ſet them right; and, by not doing ſo, he deceived and betrayed them, and violated the oath by which he had engaged himſelf to execute his office with fidelity. He has been proved to have been an active friend and agent of the ſitting member; and the Committee muſt infer, that he broke his word from partiality to him. What elſe could prevent him from admitting them, according to his ſolemn promiſe, in the mode which he, at the time, underſtood to be agreeable to the law of the place? It is manifeſt

feſt that he intended a fraud upon them; and fraud, when once it is proved, vitiates every tranſaction, and defeats every end which it was meant to obtain. This is the doctrine of courts of law, as well as of equity. They differ only in the mode of detecting fraud. In the latter, it may be proved by the oath of the party himſelf, which cannot be taken in a court of law.

But although, by the conſtitution of Derby, as it is now proved, the power of admiſſion belongs to the common hall, it does not follow, that the application for that admiſſion muſt be made to a common hall. It is the province of the mayor to aſſemble the common hall. An application to him for admiſſion is ſufficient. It is his buſineſs to know, that the proper meeting for that purpoſe is a common hall, and to ſummon one accordingly.

Beſides, the adminiſtration of the oaths to government is a preliminary ſtep which is allowed to be neceſſary before admiſſion. The mayor, and three aldermen, are the perſons appointed to adminiſter thoſe oaths. Till they did adminiſter them, the claimants could not be admitted. They were applied to for that purpoſe, and they refuſed.

The claimants being thus ſtopped *in limine*, it was impoſſible for them to proceed farther; and the Committee cannot preſume that, when this introductory ceremony ſhould have been performed, they would not then have applied to be admitted in the ſtrict legal manner. Whatever evidence there may be of a general miſapprehenſion of the law on this ſubject, theſe perſons having expreſſed no intention as to the meaſures which were to be taken after the adminiſtration of the oaths to government, nothing muſt be conjectured concerning the mode in which they would have acted. With regard to thoſe things which men have been prevented from doing, it is but fair and juſt to preſume, that, had they been ſuffered to do them, they would have done them in the manner preſcribed by law.

Upon the whole, the mayor, by firſt refuſing to ſwear the claimants, and afterwards rejecting them at the poll, acted in the double violation of the two oaths which he had ta-

ken, as mayor and as returning officer, and their votes ought, in ſubſtantial juſtice, to be allowed.

COUNSEL for the ſitting member.

The petitions, on the matter of which the Committee is ſworn to determine, both allege, that Mr. Coke was elected by a majority of *legal votes*. The general queſtion to be decided is, Whether the perſons whom the petitioners deſire to have added to the poll, were in truth *legal* voters at the time of the election. To prove that they were, it is ſaid, that the manner of their application was ſuch as to entitle them, in *ſubſtantial juſtice*, to be upon the poll. But it is to be hoped, that this judicature will never, by making a diſtinction between *ſubſtantial* and *legal* juſtice, open a door to that diſcretionary power, which under the pretence of ſubſtantial juſtice, was the occaſion, of all the miſchief that attended the former mode of trying controverted elections. If the fetters of law are broken through, good men will no longer have any rule of deciſion but their own whim and caprice; and bad men will have a pretext for following the dictates of intereſt and paſſion. The queſtion will no longer be, who was duly elected, but, who has the beſt intereſt with the majority of his judges.

It is ſurpriſing, that it ſhould be denied, that a perſon who has any inchoate right, or who means to take any advantage to which by law he is entitled, muſt, in order to complete ſuch right, or gain ſuch advantage, take the *regular* ſteps which the law has pointed out for that purpoſe. If he blunders or miſtakes in demanding what, upon a regular demand, he would be entitled to, he muſt ſuffer for it. *Vigilantibus non dormientibus jura ſubveniunt*, Suppoſe a man has the cleareſt title to an eſtate of freehold ſufficient to give a vote at a county election; and ſuppoſe that, more than a year before the election, he ſhould bring an ejectment, and ſhould miſtake the name of the pariſh, calling it, for inſtance, Highgate inſtead of Hampſtead, he would not only loſe his cauſe, but would certainly not be entitled to vote in right of the eſtate. If a clergyman has been regularly preſented and inſtituted, yet, if he has made a blunder in his induction, he will not be allowed to vote for the county.

It

It is ſaid, that the mayor and three aldermen are the proper perſons to adminiſter the oaths to government, and that the claimants applied *properly* as to that ſtep; but it appears, that their application was, not to have thoſe oaths adminiſtered to them, but *to be admitted*; and it is proved, that nobody had in contemplation any other mode of admiſſion, but that which was illegal. It cannot, therefore, be imagined, that thoſe men would ever have thought of a common-hall. The *proper* admiſſion, promiſed by the mayor, could mean nothing but an admiſſion by himſelf and three aldermen.

If thoſe men had not yet been admitted, and had gone to the court of King's Bench for *mandamuſes*, does any body doubt, but they would have deſired thoſe *mandamuſes* to be addreſſed to the mayor and three aldermen, as the perſons appointed by the charter to admit? Suppoſe ſuch writs to have iſſued, the mayor and aldermen, upon looking into the charter, and diſcovering their miſtake about the conſtitution, would have returned, that they had no ſuch power given them, and there would have been an end of the *mandamuſes*. Others muſt have been procured, directed to the common-hall. If, therefore, they had applied to the King's Bench in their own way, that court would not have put them in poſſeſſion of their franchiſes. If they had been actually admitted by the mayor and three aldermen, every one of them might have been ouſted by informations, in the nature of *quo warranto*. If, in conſequence of ſuch an admiſſion, they had attempted to exerciſe a right of common, and the owner of the land had brought an action of treſpaſs, on their pleading their being free of the borough, he might have proved the illegality of their admiſſion, and muſt have had a verdict againſt them. The Committee, therefore, it is hoped, will not now put them in a better condition than they would have been in, if their own wiſhes had been complied with; nor deprive Mr. Giſborne of a legal objection, which, had they been admitted, he would have been entitled to make at the poll;—an objection, which lay againſt all thoſe who polled in conſequence of admiſſions before the mayor and three aldermen, but which it was unneceſſary to make at the election, becauſe the number of perſons in that

predicament was equally divided between the two candidates.

That fraud, when it can be proved, is held in courts of law, as well as of equity, to vitiate a tranſaction founded upon it, is undeniable; but the maxim does not apply to the preſent caſe. The mayor practiſed no fraud on theſe men. He was as ignorant of the law as they were. Having been impoſed upon, with regard to the few whom he had admitted, and finding 92 claiming all at once, can he be blamed for delaying to admit them, even in the way which he and they thought regular, until there ſhould be ſufficient time to examine their titles? The event has proved, that his caution was very neceſſary; for it appears, that out of 65 of theſe perſons, who applied at the common halls, after the election, no fewer than 38 were rejected, becauſe their titles were defective. If it were true, that theſe men have been injured, they would be entitled to a remedy by actions againſt the mayor; but it will not be contended, that ſuch actions could be brought or maintained. The late ſtatute, giving coſts when a *mandamus* is decided in favour of the perſon demanding his freedom, particularly ſpecifies, that the application for admiſſion muſt be made to the perſons who have authority to admit, which evinces that, if the application is not made to ſuch perſons, the law conſiders that no reparation ſhall be made, becauſe no injury has been done.

The vague and undefined plea of ſubſtantial juſtice would, if it were allowed, overturn, in many inſtances, the moſt poſitive proviſions of law. Suppoſe, for example, a man to have declared, over and over again, to his heir at law, and to all his acquaintance, that he meant to diſinherit his heir, and leave his eſtate to A. Suppoſe him, agreeably to that reſolution to make a will, complete in every other reſpect, but atteſted only by two ſubſcribing witneſſes. In ſuch a caſe, the deviſee might well inſiſt, that in ſubſtantial juſtice, he was entitled to the eſtate; but it will not be pretended, that he could recover it againſt the heir, in any court of law.——Why? Becauſe an expreſs law ſays, that no deviſe of lands ſhall be good, unleſs it be atteſted by three ſubſcribing

ſubſcribing witneſſes (1). In ſhort, in all caſes, men, who claim to have the benefit of the law, muſt direct themſelves, in making their claim, by the rules preſcribed by law. No inſtance has, or can be, produced, where it has been holden that a perſon (be his title ever ſo perfect) ſhall be conſidered as poſſeſſed of any eſtate, office, or franchiſe before he has been legally put in poſſeſſion, unleſs where there has been a *regular* demand.

It has appeared, by the witneſſes, that, on the 5th and 9th of January, the only evidence produced was indentures and certificates, neither of which are, in law, ſufficient to eſtabliſh the titles of the claimants. No ſubſcribing witneſſes were preſent, nobody to prove the actual ſervice of the apprentices, and no examined copies of the pariſh regiſters tendered. It has, indeed, been ſworn, that the uſual practice was followed in this reſpect; but though, in caſes where the titles had recently accrued, the evidence offered might be ſufficient, ſurely it was not ſufficient with regard to numbers of thoſe who claimed on this occaſion. Many of their titles were to be traced back 20, 30, or 40 years, and great caution and ſtrict evidence were neceſſary in the examination. And, were nothing elſe offered in behalf of the mayor and aldermen, this ſingle circumſtance that ſuch evidence was not produced is ſufficient to juſtify them in their refuſal to admit the claimants.

The counſel for the petitioners, in reply,

Beſides enforcing, and enlarging upon, their former arguments, obſerved, That the words "*legal votes*," in the petitions, could never be confined to their ſtrict technical meaning, or held to refer only to the votes of men who were rigidly legal freemen. That, if they were ſo conſtrued, they would exclude every one who was not admitted, though he ſhould have applied according to the moſt exact forms preſcribed by the conſtitution of the place;—a doctrine which was not maintained, even on the part of the fitting member. That petitions, were the words

(1) Stat. of Frauds, 29 Char. I. *cap.* 3.

words of them to be ſo nicely weighed, would become as technical as *declarations*, and would be infected with all the diſgraceful punctilios of ſpecial pleading (1). That the act of 12 Geo. III. only meant to point out in what manner applications were to be made, in order to entitle perſons, claiming their freedom and being refuſed, to the reparation given them by that ſtatute. That, in regard to every other purpoſe, it left the law as it ſtood before, and therefore did not at all affect the preſent queſtion. That, it had been ſaid, on the other ſide, that, as this was a cauſe between Coke and Giſborne, the conduct of the returning officer, even if culpable, ought not to deprive the ſitting member of a fair advantage which the law had given him; but that to this the anſwer was, that the mayor had been proved to be Giſborne's agent, and therefore Giſborne ought to ſuffer for his improper conduct. That, though the mayor might not be liable to civil actions for his refuſal to admit the claimants, yet, perhaps, under all the circumſtances of the caſe, he and the other perſons concerned might be indicted for a conſpiracy to deprive them of their votes. That, although the mayor, by his oath of office, does not ſwear *ſpecially* any thing relative to the admiſſion of freemen, yet the general engagement that he will well and truly execute his office, binds him not to refuſe injuriouſly any perſons who have a right. That nothing had been ſaid to ſhow that the application of the claimants was not ſtrictly regular for the purpoſe of having the oaths to government adminiſtered, for that no writtten or formal notice or demand was neceſſary for that end, nor any particular ſet of words. That they certainly meant to take thoſe oaths in the firſt place, and having been ſtopped there, the Committee ought not to preſume that they would have acted improperly in the buſineſs which was to follow. That, however, it was far from being an uncontrovertible propoſition, that their votes would have been bad, had they actually been admitted by the mayor and

(1) *Vide ſupra*, p. 7, 8. Caſe of Petersfield, Note (A).

and three aldermen: for that, if they had been *de facto* in poſſeſſion of their franchiſe at the time of the election, and had not been proceeded againſt by information, (there having been ſufficient time to have queſtioned them in that manner) the Committee would not have taken upon themſelves the taſk of inquiring into the mode of the admiſſions, but would have allowed their votes (C). That it was no excuſe for the mayor to ſay, that, on account of the number of the claimants, and the antiquity of ſome of their titles, great caution was neceſſary, leſt perſons not fairly entitled ſhould be admitted, for, that the ſame caution was *always* neceſſary. That there ſurely had been ſufficient time between the beginning of January and the election, to ſcrutinize their proofs; and that the mayor, by appointing the 15th for the admiſſion of thoſe who ſhould be found to have a right, allowed that from the 9th to that day there was ſufficient time for the purpoſe. That nothing can be concluded againſt the claimants becauſe they did not come accompanied with every evidence which would be neceſſary to prove their titles, if queſtioned in a court of law. That it was enough for them to bring with them ſuch evidence, and no more, as, by the uſage of the place, had always been thought ſufficient. That ſurely the Committee would never make it a rule, with perſons, when they claim to have a right completed by admiſſion which is afterwards found to be incontrovertible, ſhould come armed with ſtrict legal evidence, or elſe loſe all benefit of their claim.

That, as to the caſes of a miſtake in the name of the pariſh in an ejectment, or of a blunder in the induction of a parſon who has been regularly preſented and inſtituted, they were not parallel to the preſent. That it cannot be preſumed, that a man, who is entitled to an eſtate, ſhould be ignorant of the pariſh in which it is ſituated. If he is, it is manifeſtly his own fault, becauſe certain information muſt be open to him. That, in like manner, if a perſon is ignorant of the proper form of induction, it muſt be owing to his own neglect. That there is no *communis error* in thoſe inſtances, as in the preſent, where every body, from whom information

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tion could have been ſought, would have ſaid, that the proper perſons to admit were the mayor and three aldermen. That the caſe of a deviſe of lands ſubſcribed by only two witneſſes was as little applicable here, for that ſuch deviſes are expreſsly annulled by a poſitive act of Parliament. But that no law has yet declared that the demand of perſons, applying as the claimants have done, ſhall go for nothing, and that they ſhall derive no benefit from it.

The counſel having cloſed their arguments, it was agreed on the part of Mr. Giſborne, that, if the votes of all the 27, or of a great majority of them, ſhould be allowed, the majority on the poll muſt be in favour of Mr. Coke. But it was underſtood, that, notwithſtanding this agreement, the counſel for the ſitting member would ſtill be at liberty to bring any charge againſt him (Coke) which might tend to avoid the election; and it was alſo underſtood, that, if the Committee ſhould either reject all the 27, or ſuch a number of them as would leave the majority of legal votes on the ſide of Giſborne, the counſel for the petitioners would, in ſuch caſe, be free to go on with evidence, to add other votes to their own poll, or take off votes from that of the other ſide; and that the ſitting member would have the ſame thing in his power, when the caſe of the petitioners ſhould be cloſed.

The Committee, after long deliberation, both on the 7th of February, the day the counſel finiſhed, and on the 8th, came to the following reſolutions:

Reſolved, "That thoſe perſons who applied to the "mayor on the 5th and 9th (of February, 1775,) and "have proved their rights, be added to the poll."

Reſolved, "That John Wedgewood be added to the "poll.

Reſolved, "That Thomas Bilſon be added to the "poll."

Reſolved, "That Charles Clarke be added to the "poll."

Reſolved, "That Thomas Hancock and William "Mattocks be added to the poll."

"Reſolved,

Reſolved, "That Thomas Jones be added to the "poll.'

Theſe ſix reſolutions were entered in the minutes, which as is uſual, were communicated to the parties; but they were not delivered by the Chairman to the counſel when they were called in. He ſaid, he was directed by the Committee to inform them, that they had come to this general reſolution:

Reſolved, "That all the 27 voters in queſtion, ex-"cept William Sale, ought to be added to the poll."

Upon this, the counſel for the ſitting member told the Committee, they were inſtructed to ſay, that they would not give the Committee any farther trouble on the part of their client.

And the ſame day, (Thurſday, the 8th of February,) the Committee, by their Chairman, informed the Houſe, that they had determined,

That Daniel Parker Coke, Eſq; the petitioner, was duly elected, and ought to have been returned (1)

(1) Votes, p. 261.

NOTES

ON THE CASE OF

DERBY,

PAGE 140. (A). After the merits of the election had been decided by the Committee, another attempt was made to obtain, from the court of King's Bench, informations againſt the honorary burgeſſes; but, as the new affidavits produced on this occaſion did not yet ſeem to the court to contain ſufficient ground for calling their right in queſtion, this application was as unſucceſsful as the former. If the privilege of making honorary burgeſſes who have a right to vote is, in fact, as great a grievance, in this and many other boroughs of the kingdom, as it is alleged to be, an effectual remedy can only be adminiſtered by the legiſlature. See the Caſe of Bedford, *ſupra*, vol. ii. p. 41, to 46.

P. 149. (B). Some may think I have been too circumſtantial in giving a detail of the evidence in this caſe, but thoſe who are ſufficiently aware of the nicety of the queſtion will judge otherwiſe. We muſt, I think, conclude that the Committee conſidered *every* circumſtance of the claimants' conduct in making their different applications, and *every* circumſtance of partiality attending the repeated delays and ultimate refuſal by the mayor, as neceſſary, in order to compenſate for the want of legal propriety in the kind of application which was made. If *all* thoſe circumſtances had not concurred, we have no right to infer that the Committee would have put thoſe men in as good a condition, as if their demand had been ſtrictly regular.—Hence it was neceſſary to ſtate every one of thoſe circumſtances, and to ſet forth how, and by what witneſſes, they were proved.

P. 169. (C). It has been ſhewn in a former note, (*ſupra*, p. 70.) that, when the right of perſons to be freemen has been brought before Committees, as a preliminary queſtion neceſſary to the deciſion of their right to vote, ſuch right has been frequently gone into, in caſes where ſuch perſons having been long enough in poſſeſſion of the franchiſe for informations to have been brought againſt them, none has been applied for, or obtained.

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